



1979

Suing Foreign Governments in American Courts: The United States Foreign Sovereign Immunities Act in Practice

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SUIING FOREIGN GOVERNMENTS IN AMERICAN COURTS: THE UNITED STATES FOREIGN SOVEREIGN IMMUNITIES ACT IN PRACTICE

by
*Beverly May Carl**

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I. INTRODUCTION

Several large lawsuits have recently been filed in Texas against foreign governments or their instrumentalities. On December 6, 1979 E-Systems, Inc. sued the Islamic Republic of Iran and the Bank Melli¹ on an agreement to modify and improve two Boeing 707 planes, seeking damages in excess of \$23 million. Earlier this year, Electronic Data Systems Corporation, Iran, brought suit against the Iranian Government and several of its departments to recover \$16 million for breach of a data processing services contract.²

The blowout of the Ixtoc well off the shore of Mexico on June 3, 1979 poured out more than 100 million gallons of oil and formed a giant slick that found its way into Texas waters and onto Texas beaches. The resulting economic and environmental damage has led to several lawsuits against Petroleos Mexicanos (Pemex), a company owned by the Mexican Government, as well as two private corporations, SEDCO and Permargo. These claims, which have now been consolidated into a single case, include a \$155 million class action by Gulf Coast fishermen,³ a \$100 million suit by various utility and navigational districts for revenue losses, and a \$100 million action by representatives of affected hotels, restaurants, and landowners.⁴

All these suits involve the Foreign Sovereign Immunities Act of 1976 ("FSIA" or "Act").⁵ Since a number of significant cases against foreign governments are also pending in other states, it would seem timely to re-

1. E-Systems, Inc. v. Islamic Republic of Iran, No. CA-3-79-1487-G (N.D. Tex., filed Dec. 5, 1979) (order denying motion for authority to serve process).

2. Electronic Data Sys. Corp. Iran v. Social Sec. Org. of Iran, No. CA-3-79-218-F (N.D. Tex. June 21, 1979) (memorandum opinion granting preliminary injunction).

3. Wall St. J., Sept. 14, 1979, at 4, col. 3.

4. *In re* SEDCO, Inc., No. H-79-1880 (S.D. Tex. Sept. 1, 1979); interview with M. Waller, District Court's Office, Nov. 26, 1979. These classes have not yet been certified. *Id.*

5. 28 U.S.C. §§ 1330, 1391, & 1602-1611 (1976), as fully set out in Appendix A.

view the application of this new legislation during its first three years of existence.

The FSIA makes five major changes in the law:

- (1) it creates a federal long-arm statute for suits against foreign governments and their agencies or instrumentalities;⁶
- (2) it eliminates in rem and quasi in rem jurisdiction against foreign sovereigns;⁷
- (3) it vests exclusive authority in the judiciary to determine whether a particular activity of a foreign sovereign is commercial;⁸
- (4) it permits execution of a judgment against certain commercial property of a foreign government;⁹ and
- (5) it establishes venue provisions for suits against foreign governments and their instrumentalities.¹⁰

II. HISTORICAL BACKGROUND

A. *Absolute Versus Restrictive Theories of Sovereign Immunity*

Although article III of the United States Constitution expressly includes suits against "foreign states" within the subject matter jurisdiction of the federal courts,¹¹ the Supreme Court ruled in 1812 in *The Schooner Exchange v. McFaddon*¹² that foreign sovereigns were immune from suits in United States courts. Reasons underlying this early doctrine of absolute immunity¹³ included the need to protect the dignity of the foreign sovereign, the inability of an American court to enforce a judgment against a foreign sovereign, and the desire for reciprocal immunity for the United States from suits in foreign countries.¹⁴

This theory of absolute immunity was abandoned in 1952 when the

6. *Id.* § 1608.

7. *Id.* §§ 1609-1611.

8. *Id.* § 1602.

9. *Id.* § 1610.

10. *Id.* § 1391(f).

11. "The judicial Power shall extend to all Cases . . . between a State, or the Citizens thereof, and *foreign States*, Citizens or subjects." U.S. CONST. art. III, § 2 (emphasis added).

12. 11 U.S. (7 Cranch) 116 (1812).

13. The Supreme Court later explained the absolute theory of immunity more fully in *United States v. Diekelman*, 92 U.S. 520, 524 (1876):

A sovereign cannot be sued in his own courts without his consent. His own dignity, as well as the dignity of the nation he represents, prevents his appearance to answer a suit against him in the courts of another sovereignty, except in performance of his obligations, by treaty or otherwise, voluntarily assumed. Hence, a citizen of one nation wronged by the conduct of another nation, must seek redress through his own government. His sovereign must assume the responsibility of presenting his claim, or it need not be considered. If this responsibility is assumed, the claim may be prosecuted as one nation proceeds against another, not by suit in the courts, as of right, but by diplomacy, or, if need be, by war. It rests with the sovereign against whom the demand is made to determine for himself what he will do in respect to it. He may pay or reject it; he may submit to arbitration, open his own courts to suit, or consent to be tried in the courts of another nation. All depends upon himself.

14. Comment, *Sovereign Immunity and the Foreign-State Enterprise in Alaska*, 4 UCLA—ALASKA L. REV. 343, 347-48 (1975).

State Department issued the famous "Tate Letter"¹⁵ announcing that the Department would no longer assert immunity on behalf of friendly foreign sovereigns in suits arising from private or commercial activity. Thereafter, this restrictive theory of sovereign immunity was accepted as the prevailing law in this country.¹⁶

B. *Role of the State Department*

In the early part of this century, the Supreme Court began to place less emphasis on whether immunity was supported by the law and practice of nations and to rely instead on the practices and policies of the State Department.¹⁷ This trend reached its culmination in *Ex parte Republic of Peru*¹⁸ and *Republic of Mexico v. Hoffman*.¹⁹ The foreign state, which had the initiative, then could choose to seek a foreign immunity determination either by asserting its claim directly in court or by requesting the State Department to assert immunity on its behalf.

C. *Commercial Versus Public Acts*

The leading case to distinguish public activities from commercial activities under the restrictive theory was *Victory Transport, Inc. v. Comisaria General de Abastecimientos y Transportes*.²⁰ Under *Victory Transport* claims against a foreign state arising from the following political or public acts would be barred by sovereign immunity: (1) internal administrative acts, such as expulsion of an alien; (2) legislative acts, such as nationalization; (3) acts involving the armed forces; (4) acts involving diplomatic activity; and (5) public loans.²¹ This distinction between public and commercial activities was followed in a number of subsequent decisions.²²

D. *Securing Jurisdiction over a Foreign Sovereign*

Prior to the enactment of the FSIA, there was no clear way to secure in

15. Letter from Jack B. Tate, State Department Acting Legal Advisor, to Acting Attorney General Philip B. Perlman (May 19, 1952), reprinted in 26 DEP'T STATE BULL. 984-85 (1952). Because the federal courts defer to an assertion of sovereign immunity made by the Department of State on behalf of a foreign sovereign, the Department's definition of the scope of sovereign immunity has frequently been controlling. See Pugh & McLaughlin, *Jurisdictional Immunities of Foreign States*, 41 N.Y.U. L. REV. 25, 55-64 (1966).

16. *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 698 (1976).

17. See Pugh & McLaughlin, *supra* note 15, at 58-64, suggesting that this judicial deference to State Department rulings is compelled by the constitutional political question doctrine; judicial rulings on such matters would unnecessarily interfere with the power of the executive branch to conduct foreign affairs.

18. "[C]ourts may not so exercise their jurisdiction, by the seizure and detention of the property of a friendly sovereign, as to embarrass the executive arm of the Government in conducting foreign relations." 318 U.S. 578, 588 (1943).

19. 324 U.S. 30 (1945).

20. 336 F.2d 354 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965).

21. *Id.* at 360.

22. *Sea Transp. Corp. v. The S/T Manhattan*, 405 F. Supp. 1244, 1246 (S.D.N.Y. 1975); *Rovin Sales Co. v. Socialist Republic of Romania*, 403 F. Supp. 1298, 1302 (N.D. Ill. 1975); see *Isbrandtsen Tankers, Inc. v. President of India*, 446 F.2d 1198 (2d Cir.), *cert. denied*, 404 U.S. 985 (1971).

personam jurisdiction over a foreign state. Because the assertion of jurisdiction inherently involves the imposition of the judicial power over the party,²³ a claimant could not "simply serve . . . process on the physical embodiment of the foreign government, because such embodiment—an embassy or consulate—is inviolable. Service on an ambassador or minister of a foreign state [was] not only void, but under a federal statute dating back to 1790 [was] a crime"²⁴

A 1976 survey of American cases revealed that state long-arm statutes had been applied, in appropriate situations, to acquire in personam jurisdiction over corporations incorporated in other countries,²⁵ but that these state statutes had not been used to secure jurisdiction over foreign sovereigns.²⁶

In *Petrol Shipping Corp. v. Kingdom of Greece*²⁷ the Second Circuit held that methods of service provided in rule 4²⁸ could not be used to obtain in personam jurisdiction over a foreign sovereign. Although the court allowed Rule 83²⁹ to be used for the purpose of giving notice to the defendant, amenability to suit was found only because the defendant had consented to jurisdiction.³⁰ Absent such consent by a foreign government, service on an agent of the government who is present within the jurisdiction, in compliance with rule 4(d)(3), has never been held a sufficient means of service upon a foreign state.³¹

The possibility of using a state long-arm statute to acquire jurisdiction over a foreign government was raised in *Republic International Corp. v. Amco Engineers, Inc.*³² The Ninth Circuit Courts of Appeals indicated that such an exercise of personal jurisdiction would not violate due process.³³ *Republic International*, however, was decided on other grounds and the court's dictum on this point of law may be incorrect.³⁴ The issue of whether jurisdiction over a foreign sovereign can be secured through a

23. See, e.g., *Pennoyer v. Neff*, 95 U.S. 714 (1877). See generally F. JAMES & G. HAZARD, *CIVIL PROCEDURE* 622-30 (2d ed. 1977).

24. Lowenfeld, *Litigating a Sovereign Immunity Claim—The Haiti Case*, 49 N.Y.U. L. REV. 377, 384 (1974) (footnotes omitted). See, e.g., 22 U.S.C. §§ 252, 253 (repealed by Diplomatic Relations Act, Pub. L. No. 95-393, § 3(a)(1), 92 Stat. 808 (1978)). See also Vienna Convention on Diplomatic Relations, opened for signature Apr. 18, 1961, art. 22, § 1, 23 U.S.T. 3227, T.I.A.S. No. 7502.

25. Note, *Obtaining Personal Jurisdiction Over Alien Corporations—A Survey of U.S. Practice*, 9 VAND. J. TRANSNAT'L L. 345 (1976).

26. See notes 32-35 *infra* and accompanying text.

27. 360 F.2d 103 (2d Cir.), cert. denied, 385 U.S. 931 (1966).

28. FED. R. CIV. P. 4 (process).

29. FED. R. CIV. P. 83 provides: "Each district court . . . may from time to time make and amend rules governing its practice not inconsistent with these rules. . . . In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules."

30. 360 F.2d at 107.

31. See Note, *Amenability of Foreign Sovereigns to Federal In Personam Jurisdiction*, 14 VA. J. INT'L L. 487, 490 (1974).

32. 516 F.2d 161 (9th Cir. 1975).

33. *Id.* at 167.

34. The court's opinion did not expressly analyze the public activity—commercial activity distinction, nor did it consider the foreign policy effects of sovereign immunity decisions.

state long-arm statute is now before the Ninth Circuit in *Insurance Co. of North American & Crystal Boat Co. v. Marina Salina Cruz*.³⁵

Prior to the enactment of the FSIA, proceedings against a foreign government had been commenced only by an attachment against that government's property within the state.³⁶ In rem jurisdiction, involving claims to title of the attached property, or quasi in rem jurisdiction, such as attaching a bank deposit, were the "ultimate recourse open to private litigants" because of the "lack of in personam jurisdiction against foreign sovereigns."³⁷ Some plaintiffs obtained numerous attachments on foreign government assets located in various parts of the United States.³⁸ This shotgun approach caused significant irritation to many foreign countries. As the House Report on the FSIA stated, "one of the fundamental purposes of this bill is to provide a long-arm statute that makes attachment for jurisdictional purposes unnecessary."³⁹

E. *Execution of Judgments Against Foreign Sovereigns*

Despite the adoption of the restrictive theory of sovereign immunity as to the right to sue a foreign sovereign, the absolute theory continued to apply to execution of judgments. The State Department made this clear in a letter filed with the court in *Weilamann v. Chase Manhattan Bank*.⁴⁰ Thus, any judgment rendered against a foreign government was not enforceable by execution. Such judgments merely formed a basis for possible enforcement outside the United States or for a request that the Department of State present a diplomatic claim to the foreign government on behalf of the successful litigant.⁴¹

III. THE FOREIGN SOVEREIGN IMMUNITIES ACT OF 1976

A. *Jurisdiction*

To obtain jurisdiction over a foreign sovereign or one of its instrumentalities under the FSIA, three elements must be satisfied: subject matter jurisdiction, in personam jurisdiction, and the service or notice provisions.

1. *Subject Matter Jurisdiction.* Federal district courts have original jurisdiction over foreign governments or their instrumentalities for any claim

35. No. 79-4050 (Alaska, filed Aug. 4, 1976).

36. See Pugh & McLaughlin, *supra* note 15, at 28-33.

37. Delaume, *Three Perspectives on Sovereign Immunity*, 71 AM. J. INT'L L. 399 (1977); Legislative Note, *Jurisdictional Immunities of Foreign States*, 23 DEPAUL L. REV. 1225, 1239 (1974).

38. H.R. REP. NO. 94-1487, 94th Cong., 2d Sess. 26-27 (1976), *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 6604, 6626, 15 INT'L LEGAL MAT'LS 1398, 1412 (1976).

39. *Id.*

40. 21 Misc. 2d 1086, 192 N.Y.S.2d 469 (Sup. Ct. Westchester County 1959). The State Department maintained that the property of the foreign government should be "immune from execution or other action analogous to execution." 192 N.Y.S.2d at 472.

41. R. von Mehren, *The Foreign Sovereign Immunities Act of 1976*, 17 COLUM. J. TRANSNAT'L L. 33, 43 (1978).

with respect to which the foreign state is not entitled to immunity.⁴² This jurisdiction is without regard to the amount in controversy. Jury trials are excluded.⁴³

2. *In Personam Jurisdiction.* One of the major changes from prior law is contained in the FSIA's provision of several bases for asserting in personam jurisdiction over a foreign state. The general rule of a foreign state's immunity from jurisdiction is provided in 28 U.S.C. § 1604. The following series of exceptions to this immunity are listed in sections 1605 to 1607.

(a) *Waivers of Immunity.* A foreign state is not immune from the jurisdiction of United States courts or of state courts in any case in which it has waived its immunity either explicitly or by implication. A subsequent withdrawal of such waiver is ineffective unless such withdrawal is in accordance with the terms of the waiver.⁴⁴

In *Ipitrade International, S.A. v. Federal Republic of Nigeria*⁴⁵ a cement sales contract contained a clause calling for arbitration by the International Chamber of Commerce. A subsequent dispute was accordingly submitted to arbitration, and the plaintiff thereafter sought to have the foreign award enforced in the United States pursuant to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.⁴⁶ The Nigerian Government argued that as a sovereign it was immune from such suit. The court, however, held that an agreement to arbitrate or to submit to the laws of another country constitutes an implicit waiver under section 1605(a)(1).⁴⁷

An explicit waiver under this section was held to exist in *Electronic Data Systems Corp. Iran v. Social Security Organization of Iran*.⁴⁸ Such waiver was found in the Treaty of Amity, Economic Relations and Consular Rights, executed by the United States and Iran in 1955. Article XI, section 4 of that treaty provides:

No enterprise of either High Contracting Party . . . shall if it engages in commercial, industrial, shipping or other business activities within the territories of the other High Contracting Party, claim or enjoy either for itself or its property, immunity from suit. . . .⁴⁹

(b) *Long-arm Provisions.* Similar to state long-arm statutes, the FSIA provides for jurisdiction over certain claims arising out of tortious acts or

42. 28 U.S.C. § 1330(a) (1976).

43. *Id.*

44. *Id.* § 1605(a)(1).

45. 465 F. Supp. 824 (D.D.C. 1978), *reprinted in* 17 INT'L LEGAL MAT'LS 1400 (1978).

46. (June 10, 1958), 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.S.T.S. 3.

47. 465 F. Supp. at 826 (citing H.R. REP. 94-1487, *supra* note 38, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS at 6617).

48. No. CA3-79-218-F (N.D. Tex. June 21, 1979) (memorandum opinion granting preliminary injunction).

49. 8 U.S.T. 901, T.I.A.S. No. 3888 (1955).

commercial activities.⁵⁰ Sufficient minimum contacts must exist between the defendant foreign state and the United States to satisfy the due process requirement established in *International Shoe Co. v. Washington*.⁵¹ There must be some nexus between the United States and the occurrence or transaction underlying the suit so as not to offend "traditional notions of fair play and substantial justice."⁵²

(i) *Commercial Activities*. Suits against foreign sovereigns involving commercial activities are permitted in three situations. The first exception from sovereign immunity is an action based upon a commercial activity carried on in the United States by a foreign state.⁵³ The second is a suit based on an act performed in the United States in connection with a commercial activity of the foreign state elsewhere.⁵⁴ Examples of these types of foreign government activities include: a representation in the United States by an agency of a foreign state that leads to an action for restitution based on unjust enrichment, an act in the United States that violates the federal securities laws or regulations, or the wrongful discharge in the United States of an employee of the foreign state who has been employed in connection with a commercial activity carried on in some third country.⁵⁵

The third exception arises when an act forming the basis for the suit occurs outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a *direct* effect in the United States.⁵⁶ In *National American Corp. v. Federal Republic of Nigeria*⁵⁷ the court held that a breach of a "letter of credit having a New York beneficiary, advised by and payable through New York banks," met the direct effect test of the third exception in section 1605(a)(2).⁵⁸ Moreover, the minimum contacts test of *Shaffer v. Heitner*⁵⁹ was satisfied because the property that the plaintiff had attached prior to the effective date of the FSIA was the same fund that formed the basis of the litigation.

Shortly thereafter a second judge in the Southern District of New York found that the contacts with the United States in the case before him were insufficient to satisfy the direct effect test. In *Carey v. National Oil Corp.*⁶⁰ the Libyan Government-owned oil company had breached certain crude oil supply contracts with Bahamian subsidiaries of a New York corpora-

50. 28 U.S.C. §§ 1605(a)(2), (5) (1976).

51. 326 U.S. 310 (1945).

52. *Id.* at 316.

53. 28 U.S.C. § 1605(a)(2) (1976).

54. *Id.*

55. H.R. REP. No. 94-1487, *supra* note 38, at 19, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS at 6617-18, 15 INT'L LEGAL MAT'LS at 1408.

56. 28 U.S.C. § 1605(a)(2) (1976).

57. 448 F. Supp. 622, 639 (S.D.N.Y. 1978), *reprinted in* 17 INT'L LEGAL MAT'LS 1407 (1978).

58. *Id.*

59. 433 U.S. 186 (1977).

60. 453 F. Supp. 1097 (S.D.N.Y. 1978), *aff'd*, 592 F.2d 673 (2d Cir. 1979), *reprinted in* 17 INT'L LEGAL MAT'LS 1180 (1975).

tion. In refusing to assert jurisdiction the court noted that the defendant had made a conscious effort to minimize contacts with the United States and had made no attempt to avail itself of any of the protections or privileges afforded by the United States.⁶¹ The Second Circuit affirmed, refusing to pierce the corporate veil of the Bahamian corporations to find a direct effect on the New York parent company.⁶²

The direct effect test was also not satisfied in *East Europe Domestic International Sales Corp. v. Terra*.⁶³ A contract had been concluded in which a Rumanian company was to sell cement to the plaintiff New York corporation. The plaintiff alleged that the contract was not performed because of interference by Terra, a Rumanian state trading corporation. Suit was brought against Terra for tortious interference with a trade or business. Although Terra had dealt with other companies within the United States, it had done so only through correspondence. Terra maintained no office in the United States, sent no representatives or salesmen to this country, and engaged in no organized publicity here. Sales to the United States amounted to less than one percent of Terra's total sales. On these facts the court decided there had been no real entering of the marketplace in the United States⁶⁴ and concluded: "The alleged tortious activity took place outside the United States. The purported injury took place in the United States only because the plaintiff is domiciled or doing business here. This . . . is an insufficient contact for due process purposes."⁶⁵

In *Upton v. Empire of Iran*⁶⁶ the plaintiffs, American citizens, were injured when the roof of the international airport in Tehran collapsed. The action was dismissed on the ground that causing injury to American citizens abroad was insufficient to satisfy the requirements of the District of Columbia's long-arm statute,⁶⁷ after which the federal long-arm statute was patterned.⁶⁸ Moreover, mere operation of an airport abroad did not establish sufficient contacts with the United States under section 1605(a)(2) of the FSIA to satisfy the *International Shoe* due process requirements.⁶⁹

(ii) *Noncommercial Torts*. In addition to torts arising from commercial activities that fall under the section 1605(a)(2) exception, the FSIA authorizes jurisdiction for tort actions seeking monetary recovery for personal injury, death, or property damage.⁷⁰ This exception, however, requires that the injury or damage be "caused by the tortious act or omission of that foreign state or any official or employee . . . while acting

61. 453 F. Supp. at 1101, 17 INT'L LEGAL MAT'LS at 1186.

62. 592 F.2d 673 (2d Cir. 1979).

63. 467 F. Supp. 383 (S.D.N.Y. 1979), reprinted in 18 INT'L LEGAL MAT'LS 977 (1979).

64. *Id.* at 390, 18 INT'L LEGAL MAT'LS at 982.

65. *Id.*, 18 INT'L LEGAL MAT'LS at 982.

66. 459 F. Supp. 264 (D.D.C. 1978), reprinted in 18 INT'L LEGAL MAT'LS 103 (1979).

67. Pub. L. No. 91-358, § 132(a), 84 Stat. 549 (1970).

68. H.R. REP. NO. 94-1487, *supra* note 38, at 13, reprinted in [1976] U.S. CODE CONG. & AD. NEWS at 6612, 15 INT'L LEGAL MAT'LS at 1405.

69. 459 F. Supp. at 266.

70. 28 U.S.C. § 1605(a)(5) (1976).

within *the scope of his office or employment*.”⁷¹ Moreover, the act or omission must have occurred within the United States.⁷² According to the House Report, this provision was directed primarily to the problem of traffic accidents.⁷³ Nevertheless, one plaintiff is attempting to use this provision in an action against the Republic of Chile, its secret police agency, and others for the murder of her husband, the Chilean Ambassador to the United States under President Allende. Ambassador Letelier was killed in Washington, D.C. in 1976 when a bomb planted in his car exploded.⁷⁴ This provision is also the basis of a personal injury claim arising from an alleged machine gunning of a Florida lobsterman by three Bahamian gunboats during an apparent dispute over fishing rights. The plaintiffs, parents of a wounded fisherman, a minor, claim that the incident took place approximately sixty miles from the coast of Florida and within the 200-mile United States domestic fishing zone.⁷⁵

A section 1605(a)(5) exception from sovereign immunity is not available when a claim is based on a discretionary function, regardless of whether the discretion is abused.⁷⁶ Similarly, it may not be used to bring claims based on malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contractual rights.⁷⁷ In *Yessenin-Volpin v. Novosti Press Agency*⁷⁸ the plaintiff sued newspapers owned by the Soviet Government for libel based upon publication of the allegedly defamatory articles outside the United States. Because the action fell under section 1605(a)(5)(B), the court held that the Soviet papers were entitled to immunity. The plaintiff had argued that this suit should instead be governed by section 1605(a)(2), *i.e.*, newspaper publication should qualify as a commercial activity carried on outside the United States having a direct effect within the United States. Unlike section 1605(a)(5), section 1605(a)(2) contains no prohibition against libel suits. Although conceding that these newspapers were engaged in commercial activities, the judge found that the alleged libels were not “in connection with a commercial activity,” but rather involved an “activity whose essential nature is public or governmental.”⁷⁹ Thus, this suit did not fall under section 1605(a)(2).

A similar argument was made in *Electronic Data Systems (EDS)*.⁸⁰

71. *Id.* (emphasis added).

72. *Id.*

73. H.R. REP. NO. 94-1487, *supra* note 38, at 20-21, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS at 6619, 15 INT'L LEGAL MAT'LS at 1409.

74. Complaint, *Letelier v. The Centro Nacional de Informaciones*, No. 78-1477 (D.D.C., filed Aug. 8, 1978), *cited in* Brower, Bistline & Loomis, *The Foreign Sovereign Immunity Act of 1976 in Practice*, 73 AM. J. INT'L L. 200, 201 n.9 (1979) [hereinafter cited as Brower].

75. Complaint, *Perez v. The Bahamas*, No. 78-4110 (S.D. Fla., filed Aug. 30, 1978), *cited in* Brower, *supra* note 74, at 201 n.14.

76. *Zamnik v. Veterans Administration*, Nos. 78-6009 & 78-7021 (2d Cir. Mar. 30, 1979), *aff'g* 77 Civ. 1610 (S.D.N.Y. Dec. 19, 1977) (slip op.).

77. 28 U.S.C. §§ 1605(a)(5)(A), (B) (1976).

78. 443 F. Supp. 849 (S.D.N.Y. 1978), *reprinted in* 17 INT'L LEGAL MAT'LS 720 (1978).

79. 443 F. Supp. at 854, 17 INT'L LEGAL MAT'LS at 725.

80. *Electronic Data Sys. Corp. Iran v. Social Sec. Org. of Iran*, No. CA-3-79-218-F (N.D. Tex. June 21, 1979) (order granting preliminary injunction).

EDS alleged that the Government of Iran wrongfully and maliciously induced other defendants to breach their contract. The Government of Iran countered that under section 1605(a)(5)(B), a foreign sovereign may not be sued for tortious interference with contractual rights. The court, however, characterized the interference as a commercial tort falling under section 1605(a)(2).⁸¹ The opinion describes the “defendants’” (plural) actions as commercial in nature. Such characterization may be appropriate for the two agencies which may have actually breached the contract, the Social Security Organization and the Ministry of Health and Welfare. But where the “state” or the Government of Iran is concerned, exactly what conduct is being labeled “commercial”? Any interference with the contract by the Revolutionary Government of Iran may have resulted from a political or public decision. As such, it would not qualify as a commercial act under section 1605(a)(2) and hence would come under the 1605(a)(5)(B) bar. For basically the same reason, the Southern District Court of New York stated in *Carey v. National Oil Corp.*⁸² that even if the case had not been decided on other grounds, the actions of Libya would at most constitute a tortious interference with contractual rights, and such claims are barred under section 1605(a)(5)(B).^{82a}

(iii) *Expropriation Claims.* In a few limited situations, suits based on an expropriation claim may be brought against a foreign sovereign under the FSIA. First, the property must have been “taken in violation of international law.”⁸³ The House Report describes this as including the nationalization or expropriation of property without payment of prompt, adequate, and effective compensation.⁸⁴ It also includes takings that are arbitrary or discriminatory.⁸⁵

In addition to an illegal taking, the claims must fall within one of the following two categories. Under the first category are cases in which the improperly taken property, or any property exchanged for such property, is *present* within the United States and in which such presence is in connection with a *commercial* activity carried on in the United States by the foreign state.⁸⁶ This test could be satisfied, for instance, when a foreign state expropriates a fleet of aircraft and uses these aircraft, or planes exchanged for them, to furnish commercial air services to the United States.⁸⁷ The second category of expropriations includes cases where the seized property, or any property exchanged therefor, is owned or operated

81. *Id.* at 22 n.9.

82. 453 F. Supp. 1097 (S.D.N.Y. 1978), *aff’d per curiam*, 592 F.2d 673 (2d Cir. 1979); see text accompanying notes 60-62 *supra*; cf. *East Europe Domestic Int’l Sales Corp. v. Terra*, 467 F. Supp. 383 (S.D.N.Y. 1979) (federal district court has no personal jurisdiction; 28 U.S.C. § 1605’s itemization of nonimmune transactions prescribes necessary contacts).

82a. 453 F. Supp. at 1102.

83. 28 U.S.C. § 1605(a)(3) (1976).

84. H.R. REP. NO. 94-1487, *supra* note 38, at 19-20, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS at 6618, 15 INT’L LEGAL MAT’LS at 1408.

85. *Id.*

86. 28 U.S.C. § 1605(a)(3) (1976).

87. R. von Mehren, *supra* note 41, at 59.

by an instrumentality of the foreign government, and that instrumentality is engaged in a commercial activity in the United States. Under this situation, no property need be present in the United States in connection with the commercial activity of the instrumentality of the foreign state.⁸⁸ Assume again that a foreign government expropriates airplanes of a United States citizen and uses them, or craft exchanged for them, to operate air services anywhere in the world. If the state-owned airline is engaged in any commercial operations within the United States, such as either commercial air services to this country with planes unrelated to the expropriated planes or substantial solicitation of business, then the foreign state and its airline would be subject to suit under the FSIA.⁸⁹

The House Report indicates that the act of state doctrine should not be used to defeat claims under this section.⁹⁰ Citing the *Dunhill* case,⁹¹ the Committee concluded that the act of state doctrine is not applicable when a commercial activity of a foreign sovereign involves significant jurisdictional contacts with the United States.⁹²

(iv) *Property Rights*. Section 1605(a)(4) denies immunity to foreign sovereigns in litigation concerning real property located within the United States. The question arises whether this provision applies to diplomatic and consular property. The Vienna Convention on Diplomatic Relations provides in article 22 that the "premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution."⁹³ The House Report on the FSIA interpreted this article as permitting local courts to adjudicate questions of ownership, rent, servitudes, and similar matters, as long as the foreign state's possession of its diplomatic or consular premises is not disturbed.⁹⁴

In *County Board v. German Democratic Republic*⁹⁵ Arlington County, Virginia, sued the East German Government for real estate taxes owed on an apartment building in Arlington. The defendant's request for immunity was denied on two grounds: ownership of these premises was commercial in character, which brought the matter within section 1605(a)(2), and the case involved rights in real property located in the United States, which fell under section 1605(a)(4).⁹⁶

88. 28 U.S.C. § 1605(a)(3) (1976).

89. R. von Mehren, *supra* note 41, at 59.

90. H.R. REP. NO. 94-1487, *supra* note 38, at 20 n.1, reprinted in [1976] U.S. CODE CONG. & AD. NEWS at 6618-19 n.1, 15 INT'L LEGAL MAT'LS at 1408 n.1. See also 22 U.S.C. § 2370(e)(2) (1976).

91. Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976).

92. H.R. REP. NO. 94-1487, *supra* note 38, at 20 n.1, reprinted in [1976] U.S. CODE CONG. & AD. NEWS at 6618-19 n.1, 15 INT'L LEGAL MAT'LS at 1408 n.1.

93. 23 U.S.T. 3227, 3228 T.I.A.S. No. 7502.

94. H.R. REP. NO. 94-1487, *supra* note 38, at 20, reprinted in [1976] U.S. CODE CONG. & AD. NEWS at 6619, 15 INT'L LEGAL MAT'LS at 1409.

95. No. 78-293-A (E.D. Va. Sept. 6, 1978), reprinted in 17 INT'L LEGAL MAT'LS 1404, 1405-06 (1978).

96. 17 INT'L LEGAL MAT'LS at 1405-06.

Immunity is also not available to the foreign state for claims involving either real or personal property located within the United States when the foreign government's interest in such property was created through gift or inheritance.⁹⁷

(v) *Maritime Liens*. As in rem and quasi in rem jurisdiction may no longer be obtained against a foreign sovereign or its instrumentalities,⁹⁸ the FSIA establishes a method of securing in personam jurisdiction for suits in admiralty to enforce a maritime lien against a vessel or cargo of a foreign state, providing the lien is based upon a commercial activity of the foreign state.⁹⁹ Although such jurisdiction is personal in nature, any judgment against the foreign state may not exceed the value of the vessel or cargo upon which the maritime lien arose. The value is to be determined as of the time notice of the suit is served.¹⁰⁰

(c) *Effect of an Appearance*. An appearance by a foreign state in an action does not confer personal jurisdiction with respect to claims that could not have been otherwise brought under the FSIA.¹⁰¹ The foreign state thus may appear to contest jurisdiction without such an appearance thereby constituting submission to jurisdiction. On the other hand, should the foreign state file a responsive pleading without raising the defense of sovereign immunity, such action would be considered an implicit waiver of immunity under section 1605(1).

3. *Elimination of In Rem and Quasi In Rem Jurisdiction*. Because the prior practice of attaching property of foreign sovereigns to secure jurisdiction annoyed other nations, in rem and quasi in rem jurisdiction against foreign sovereigns and their instrumentalities has been abolished. Thus, property of a foreign government may no longer be attached as a means of commencing a lawsuit.¹⁰² In *National American Corp. v. Federal Republic of Nigeria*¹⁰³ the plaintiff had attached defendant's property prior to the effective date of the FSIA. Under New York law, certain technical defects existed in the levy; once the FSIA became effective, plaintiff was unable to remedy these defects since attachment was no longer available as a basis for jurisdiction. The court, however, applied the in personam jurisdiction provisions of the Act retroactively to permit the plaintiff to continue his action.¹⁰⁴

The legislative policy against attachments to secure jurisdiction over foreign sovereigns is so strong that the FSIA provides if a plaintiff arrests or

97. 28 U.S.C. § 1605(a)(4) (1976).

98. *See id.* §§ 1609-1610.

99. *Id.* § 1605(b).

100. *Id.*

101. *Id.* § 1330(c).

102. *Id.* § 1609.

103. 448 F. Supp. 622, 639 (S.D.N.Y. 1978), *reprinted in* 17 INT'L LEGAL MAT'LS 1407 (1978).

104. 448 F. Supp. at 638-39, 17 INT'L LEGAL MAT'LS at 1413.

attaches a vessel or cargo belonging to a foreign government, the plaintiff will lose his in personam remedy and the foreign state will be immune from suit.¹⁰⁵ The only exception to this rule arises when the plaintiff was unaware that the vessel or cargo of a foreign state was involved.¹⁰⁶ According to the House Report,¹⁰⁷ this should be a rare situation because the flag of the vessel, the circumstances giving rise to the maritime lien, or the information contained in ship registries kept in ports throughout the United States should make known the ownership of the vessel in question, if not the cargo. On the other hand, evidence that a party relied on a standard registry of ships that did not reveal a foreign state's interest in a vessel is prima facie evidence of the party's unawareness that a vessel of a foreign state was involved.¹⁰⁸

4. *Service of Process.* Section 1608 sets forth provisions on how service of process is to be made on a foreign sovereign and its agencies or instrumentalities. Designed to ensure adequate notice to the defendant, these provisions require translation of key documents, proper transmittal channels, and explanations of the legal significance of the proceedings. This section sets forth the *exclusive* procedure for service: "[I]nformal notification through channels clearly outside the obvious requirements of the applicable statute cannot be substituted for those which meet the requirements."¹⁰⁹

Section 1608(a) establishes the procedures for service on a foreign state or a political subdivision thereof; this subsection does not apply to service on an agency or instrumentality of the foreign government. Subsection (a) provides for a hierarchy in the methods of service. As a method of last resort, paragraph (4) provides for service through diplomatic channels if service cannot be made by mail within thirty days. This final alternative is vital; the United States Postal Service refuses to accept mail for delivery to certain countries when civil strife or other conditions make delivery unlikely.¹¹⁰ A notice of suit must be prepared in accordance with the form set forth in Department of State Regulations,¹¹¹ which also establish the

105. 28 U.S.C. § 1605(b)(1) (1976); see *Jet Line Serv., Inc. v. M/V Marsa El Hariga*, 462 F. Supp. 1165 (D. Md. 1978) (plaintiff lost in personam remedy by arresting ship owned by Libyan Government).

106. 28 U.S.C. § 1605(b)(1) (1976).

107. H.R. REP. NO. 94-1487, *supra* note 38, at 22, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS at 6620, 15 INT'L LEGAL MAT'LS at 1409.

108. *Id.*

109. *Gray v. Permanent Mission of People's Republic of Congo to United Nations*, 443 F. Supp. 816, 821 (S.D.N.Y. 1978), *reprinted in* 17 INT'L LEGAL MAT'LS 714, 717 (1978). See also 40 D 6262 *Realty Corp. v. United Arab Emirates Gov.*, 447 F. Supp. 710 (S.D.N.Y. 1978).

110. See *Electronic Data Sys. Corp. Iran v. Social Sec. Org. of Iran*, No. CA-3-79-218-F (N.D. Tex. June 21, 1979) (order granting preliminary injunction).

111. 22 C.F.R. § 93.2 (1979); see Appendix B. See also U.S. Dep't State, Memorandum of Judicial Assistance under the Foreign Sovereign Immunities Act and Service of Process upon a Foreign State (May 10, 1979), *reprinted in* 18 INT'L LEGAL MAT'LS 1177 (1979); Letter from Lee R. Marks, Deputy Legal Adviser of State Dep't to Charles N. Brower (June

procedures for service through diplomatic channels.¹¹²

Section 1608(b) provides the methods by which service shall be made upon an agency or instrumentality of a foreign state. If, for example, a contract contains a special arrangement for service, such procedure may be used.¹¹³ Similarly, service may be made upon an officer or appointed agent of the foreign agency or instrumentality in the United States.¹¹⁴ If no special arrangement exists and if the defendant has no representative in the United States, then one of three alternative methods may be available. The first two options provide for either service by a letter rogatory¹¹⁵ or by mail from the court with return receipt requested.¹¹⁶ As a third means, subparagraph 1608(b)(3)(C) authorizes the court to use any other method of service,¹¹⁷ provided it is "consistent with the law of the place where service is to be made." It should be noted here that many civil law nations tend to view service of process as an act of the sovereign that must be carried out by an official of the court. Service by a private individual within the territory of a foreign nation may be illegal. Most experts from civil law countries have indicated that service of United States judicial documents by mail is objectionable.¹¹⁸

Compliance with the service provisions of the FSIA may not be easy, especially where relations with the foreign government are less than amicable. *Electronic Data Systems*¹¹⁹ illustrates these difficulties. The plaintiff therein sought to serve the Social Security Organization of Iran ("SSO") and the Ministry of Health and Welfare of that nation ("Ministry"). As "agencies or instrumentalities," normally they would have been served under section 1608(b). Neither subparagraph (1) nor (2) could be used, since no special arrangements existed with Iran and the defendants had no authorized agent with the United States. Subparagraph 3(B), mail requiring a signed receipt, was also unavailable because the United States Postal Service was not accepting mail to Iran on February 23, 1979, the date when service was first attempted.

15, 1979), reprinted in 18 INT'L LEGAL MAT'LS 1184 (1979) (discussing transmittal of diplomatic notes of foreign governments to United States courts).

112. 22 C.F.R. § 93.1 (1979).

113. 28 U.S.C. § 1608(b)(1) (1976).

114. *Id.* § 1608(b)(2).

115. *Id.* § 1608(b)(3)(A). A letter rogatory is a formal request from the court to the court of a foreign nation to perform some judicial act. 22 C.F.R. § 92.54 (1979).

116. 28 U.S.C. § 1608(b)(3)(B) (1976).

117. See, e.g., FED. R. CIV. P. 83. See also *Petrol Shipping Co. v. Kingdom of Greece*, 360 F.2d 103, 107-10 (2d Cir.), cert. denied, 385 U.S. 931 (1966); Note, *supra* note 31, at 489-500.

118. Report of the U.S. Delegation to the Special Commission on the Operation of the Convention of 15 Nov. 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, Nov. 21-25, 1977, reprinted in 17 INT'L LEGAL MAT'LS 312, 317 (1978). See also Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Done Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638, 658 U.S.T.S. 163, reprinted in FED. R. CIV. P. 4, Notes; Carl, *Service of Judicial Documents in Latin America*, 53 DEN. L.J. 455 (1976).

119. *Electronic Data Sys. Corp. Iran v. Social Sec. Org. of Iran*, No. CA-3-79-218-F (N.D. Tex. June 21, 1979) (order granting preliminary injunction).

To overcome this obstacle, the judge fashioned his own method by reading into subparagraph 1608(b)(3)(C) the use of diplomatic channels provided for in 1608(a)(4), although subpart (a) of this section speaks directly only to service on foreign governments or their political subdivisions. The Government of Iran had also been named as a defendant in this suit, but no attempt was made to serve the government at that time, because section 1608(a)(4) could not be used against a foreign government until a thirty-day time period for service by mail under section 1608(a)(3) had expired. As against the SSO and the Ministry, only the method established under 1608(a)(4), and not the thirty-day prerequisite, was read into section 1608(b)(3)(C). Under this reasoning, the court authorized immediate resort to diplomatic channels against these two instrumentalities.

Accordingly, on February 23 the court ordered the Clerk to mail the documents, return receipt requested, to the Director of Consular Services, Department of State, in Washington, D.C. These papers were in turn sent to the American Embassy in Tehran which transmitted them, together with a diplomatic note, to the Iranian Ministry of Foreign Affairs on March 27. A certified copy of the Embassy's diplomatic note was returned and filed with the court in Texas on September 4.

The use of section 1608(a)(4), however, to serve these instrumentalities of a foreign government apparently created some confusion. Although this attempt was intended to apply only to the SSO and the Ministry, the note from the American Embassy stated it was transmitting a summons on "the Government of Iran" as well as the SSO and the Ministry. Moreover, the documents were not sent directly to the SSO or the Ministry, but rather to the Ministry of Foreign Affairs of Iran with a request that they be forwarded to the appropriate authorities.

Meanwhile, the plaintiff sought to effect service of process through an alternative route. On March 12 the court issued an order authorizing the mailing of the papers to the SSO and the Ministry "from any point of origin" with a return receipt required. On March 15 copies of the documents were mailed to these two agencies from Paris, France by an employee of the plaintiff. This March 12 order had been based on section 1608(b)(3)(C), which authorizes any method "directed by . . . the court consistent with the law of place where service is to be made." The public record does not indicate whether an inquiry was made to determine if such mailing was "consistent" with the law of either France or Iran. In France, service on persons living outside that nation is made by a *huissier* (a court official) delivering the papers to the State Attorney of France; thereafter certified copies are forwarded to the defendant by registered mail, return receipt required.¹²⁰ The term "where service is to be made" in section 1608(b)(3)(C) also raises an issue of private international law. Has this attempted service been "made" in France or in Iran? In any event, the 1939 Code of Civil Procedure of Iran was "largely inspired by French

120. Code Civ. Proc. art. 1033-3, cited in H. DE VRIES, CIVIL LAW AND THE ANGLO-AMERICAN LAWYER 197 (1975).

law.”¹²¹ As the documents were never delivered to the State Attorney of France, it is possible this mailing by the plaintiff's employee would be invalid under both French and Iranian law.

As of June 21, no receipts had been returned on the papers mailed from France, nor had a copy of the American Embassy's transmittal note been returned to the court. Nonetheless, the judge concluded that service had been attempted on the SSO and on the Ministry in compliance with section 1608. The lack of “proof of receipt” of service did “not mandate dismissal at this time” nor prevent the issuance of a preliminary injunction.¹²²

Despite the inclusion of the Government of Iran within the diplomatic note of March 27 from the American Embassy, the court held that no legally effective service had been made on the Government of Iran. The plaintiff argued that the Government had actual notice and was, in fact, participating through counsel in the hearings. Refusing to accept this argument, the court reasoned that under section 1330(b) and (c) a foreign government cannot be subject to a claim solely by virtue of an appearance; personal jurisdiction over such a defendant exists only for claims arising out of those transactions or occurrences specifically enumerated in sections 1605 to 1607. Thus, the Government of Iran had not been served as required under the FSIA; neither had it “made an appearance sufficient for all purposes.”¹²³ Nevertheless, the court concluded that the Government's actual knowledge of the lawsuit was sufficient to support a preliminary injunction against removal of assets. A different quantum of appearance was considered necessary for this emergency relief.

The June 21 opinion of the court also permitted the plaintiff “to continue its efforts to effect service on the Government of Iran.” In the meantime, the United States Postal Service had begun accepting mail to Iran, and the court clerk on April 11 mailed copies of the papers to the Head of the Ministry of Foreign Affairs, the SSO, and the Ministry. Apparently, the mailing to the Government of Iran was intended to satisfy section 1608(a)(3), and that to the SSO and the Ministry to satisfy 1608(b)(3)(B).

On June 20, another effort was made to effect service through diplomatic channels under section 1608(a)(4). The previous mailing to the Government of Iran on April 11 was viewed as satisfying the thirty-day requirement of section 1608(a)(3), so that subparagraph (4) now became available for service on the government. This time, papers directed toward the Government, the SSO, and the Ministry were mailed by the court clerk to the Director of Special Consular Services of the Department of State in Washington, D.C. On July 11 the State Department forwarded these papers, together with a diplomatic note, to the Embassy of Iran in Washington, D.C. A certified copy of that transmittal note was returned and filed with

121. 1 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW I-52 (V. Knopp ed. 1975).

122. Electronic Data Sys. Corp. Iran v. Social Sec. Org. of Iran, No. CA-3-79-218-F, at 7.

123. *Id.* at 10.

the court on July 31. This particular means of service raises one question. The diplomatic channel utilized by the State Department was transmittal to the Iranian Embassy in Washington, D.C., rather than the normal method of forwarding to the American Embassy in Tehran for delivery to the Iranian Ministry of Foreign Affairs. Section 1608(a)(4) merely states that the papers shall be transmitted "to the foreign state." The House Report, however, indicates that diplomatic channels can also include transmittal by the Department of State to the embassy of the foreign nation in Washington, D.C. The only requirement is that the "papers be transmitted in such a way that the foreign state has actual notice."¹²⁴

The two attempts to serve the defendant by mail—on March 15 and on April 11—have never produced any return receipts. One might argue for a presumption that an envelope properly addressed will be delivered in due course. This proposal seems dubious in light of the situation in Iran as of the end of 1979. Moreover, section 1608(c)(2) of the FSIA provides that service "shall be deemed to have been made . . . as of the date of receipt indicated in the . . . signed and returned postal receipt" Hence, the attempts to serve these defendants by mail would seem to be ineffective.

In contrast, when the documents are transmitted through diplomatic channels, there is no requirement that the foreign state formally accept them.¹²⁵ Section 1608(c)(1) provides that service is deemed "made . . . as of the date of transmittal . . . of the diplomatic note." The effective date of the service on the Foreign Ministry in Tehran would thus be March 27, while that on the Embassy of Iran in Washington, D.C. would be July 11. Although the March 27 service did not apply to the Government of Iran, the July 11 service on that government would seem to do so.

The only remaining question is whether section 1608(a)(4) may properly be brought in through section 1608(b)(3)(C) to permit the use of diplomatic channels for the March 27 service on the SSO and the Ministry. Section 1608(b)(3)(C) requires that the method selected by the court be consistent with the law of the place where service is to be made. The decision does not mention what Iranian law is on this point. Nonetheless, foreign objections to American methods of service usually relate to our more informal practices, such as service by mail or by private individuals. Conversely, use of official channels such as a letter rogatory or a diplomatic note is widely accepted throughout the world. In absence of proof to the contrary, it would seem reasonable to assume no local law had been violated by the use of diplomatic channels to serve these two instrumentalities.

The reader should recall that section 1608(b)(3)(C) was also construed to permit service on an agent or instrumentality without compliance with the provision in section 1608(a)(4) that limits diplomatic channels to those

124. H.R. REP. NO. 94-1487, *supra* note 38, at 24, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS at 6623, 15 INT'L LEGAL MAT'LS at 1411.

125. *Id.* at 25, [1976] U.S. CODE CONG. & AD. NEWS at 6624, 15 INT'L LEGAL MAT'LS at 1141.

cases in which service by mail cannot be made within thirty days. This result should be compared with the holding in *E-Systems, Inc. v. Islamic Republic of Iran*,¹²⁶ in which the court refused to authorize service through diplomatic channels under section 1608(a)(4) because the plaintiff had not yet attempted to serve the defendant by mail under section 1608(a)(3), and thus the thirty-day period had not started to run. The court reasoned that use of diplomatic channels was intended by Congress to be the method of last resort in order to minimize the burden on United States diplomats. Although the court took judicial notice of the turmoil in Iran during December 1979, it noted that "much can happen in a 30-day period. . . . It is possible that normal mail communications and normal relations between the United States and Iran will resume within that period or that the present mail delivery will suffice."¹²⁷ Thus, the plaintiff's request was treated as premature.

To the extent the *E-Systems* ruling is limited to the Government of Iran, the holding is not inconsistent with that in the *Electronic Data Systems* case. But *E-Systems* had also named as a defendant the Bank Melli, a government-owned Iranian corporation. Had the court wished to follow the *Electronic Data Systems* approach, resort to diplomatic channels for service could have been authorized at once against this agency or instrumentality. The facts of the two cases do differ on one point. The United States Post Office was not accepting mail to Iran on the date of the *Electronic Data Systems* ruling in question;¹²⁸ in *E-Systems* there was no assertion that mail to Iran had been halted. Hence, in theory there may have been less basis in *E-Systems* to waive the time requirement. From a practical standpoint, however, this distinction seems irrelevant since, at the time of the *E-Systems* decision, American Embassy personnel were hostages in Tehran. Authorization to use diplomatic channels must have appeared futile. Under these circumstances, there is probably considerable merit in the position that the thirty-day time period in the notice provisions of the FSIA should be strictly applied. A reasonable waiting period is often indispensable to working out difficult problems in foreign relations.

Moreover, the complaint in *E-Systems* stated that the Bank Melli maintains an "agency office" in New York "where it may be served with process."¹²⁹ Thus, the plaintiff seemingly had available an easy method of service on the bank under section 1608(b)(2). This method may be used on the plaintiff's own initiative, for, as the court noted, "the statute does not require judicial approval for the issuance of process . . . [and] does not require that leave of court be obtained for proper service of process."¹³⁰

126. No. CA-3-79-1487-G (N.D. Tex. Dec. 6, 1979) (order denying motion for authority to serve process).

127. *Id.* at 4.

128. No. CA-3-79-218-F (N.D. Tex., order filed Feb. 23, 1979).

129. No. CA-3-79-1487-G (N.D. Tex., complaint filed Dec. 5, 1979).

130. No. CA-3-79-1487-G (N.D. Tex., Dec. 6, 1979) (order denying motion for authority to serve process).

Informal notification outside the channels authorized by section 1608 is not permissible, and literal compliance with those provisions should usually be required. Nevertheless, there may be situations where some leeway would be appropriate. Within a purely domestic context, American courts are apt to apply service requirements quite strictly because service often confers jurisdiction over the defendant in the sense of the power or the right of the court to hear the case.¹³¹ In contrast, under the FSIA, service does not perform this function; instead, jurisdiction over the foreign state must be separately predicated on one of the grounds listed in section 1605 or 1607. The role of service is solely to provide notice. In *Electronic Data Systems* the defendants that had appeared through counsel certainly had received notice by some means; to dismiss this action because of a possible technical defect in service would seem unduly harsh. Once a plaintiff has made a good-faith effort to comply with section 1608, and the defendant has either received the requisite documents, as well as translations thereof, through one means or another, the court should be liberal in treating the service requirements of the FSIA as satisfied. Such result would seem especially warranted when the defendant has actually appeared in the litigation.

Special notice provisions govern the enforcement of maritime liens against foreign governments.¹³² Designed to allow a plaintiff to institute suit without arresting the vessel or cargo of a foreign sovereign, the FSIA provides that a copy of the summons and complaint must be delivered to the master or other person having possession of the cargo or vessel. In addition, the plaintiff must endeavor to make service pursuant to section 1608 on the foreign government or instrumentality owning the vessel or cargo. In this situation, however, it is not necessary to prove under section 1608(c) that the papers actually reached the foreign government or instrumentality.¹³³

B. *Entities to Which Act Applies*

In addition to granting immunity to foreign states and their political subdivisions, the FSIA applies to any "agency or instrumentality of a foreign state."¹³⁴ To qualify as an agency or instrumentality, three requirements must be satisfied. First, the entity must be a separate person, corporate or otherwise. Secondly, it must be an organ of a foreign state or political subdivision thereof, or alternatively, a majority of its shares or other ownership interest must be held by a foreign state or political subdivision thereof. Finally, it cannot be a citizen or a state of the United States nor be created under the laws of any third country.¹³⁵

131. See e.g., *Grace v. MacArthur*, 170 F. Supp. 442 (E.D. Ark. 1959); R. CRAMTON, D. CURRIE, & H. KAY, *CONFLICTS OF LAWS: CASES, COMMENTS, QUESTIONS* 575 (2d ed. 1975).

132. 28 U.S.C. § 1605(b) (1976).

133. *Id.*

134. *Id.* § 1603(b).

135. *Id.*

In *Yessenin-Volpin v. Novosti Press Agency*¹³⁶ the plaintiff argued that Novosti was not owned by the state and therefore was not an instrumentality entitled to sovereign immunity under the FSIA. Novosti, an information agency of the Soviet public organizations, supplied certain materials to foreign media for a fee and exchanged information with both domestic and foreign media services. The Soviet Government provided Novosti with free use of transmission facilities, furniture, equipment, and several buildings. Other buildings were leased by Novosti from the Soviet Government. Novosti had its own fixed assets, and the Soviet state bore no responsibility for Novosti's business activities or financial obligations. The plaintiff contended that the defendant's right to use certain state property free of charge did not mean that it was owned by the state. The court, while pointing out that the statute's reference to ownership was "ill-suited to concepts which exist in socialist states," nevertheless found that Novosti was an agency or instrumentality within the meaning of the FSIA, because the socialist state ultimately is the sole owner of all means of production.¹³⁷

In contrast, in *Edlow International Co. v. Nuklearna Elektrarna Krsko*¹³⁸ a district court held that the defendant, a Yugoslav workers' organization established to construct and operate a nuclear power plant, was not an agency or instrumentality of a foreign state within the meaning of the FSIA.¹³⁹ Focusing on the degree of government control over the entity, the court pointed out that the Yugoslavian Government did not subsidize the defendant (NEK), held no seats on NEK's board, and took no direct hand in the daily management of NEK's operations. The court indicated concern that if a nation's system of ownership were alone determinative of whether an entity is an agency or instrumentality under the Act, then every entity of a socialist state could be so classified.¹⁴⁰

In *Herzberger v. Compania de Acero del Pacifico, S.A.*¹⁴¹ the defendant organization sought removal from state to federal court under the FSIA. The plaintiff argued that defendant was not an agency or instrumentality within the meaning of the statute and therefore was not entitled to removal. The defendant, a Chilean corporation, was ninety-five percent owned by CORFO, an entity in turn wholly owned by the Republic of Chile. On these facts the court concluded that the defendant did qualify as an agency or instrumentality of a foreign state.¹⁴²

In *United Euram Corp. v. Union of Soviet Socialist Republics*¹⁴³ the plaintiff sued the USSR, its Ministry of Culture, and the State Concert Society of the USSR (Gosconcert) on a contract to send performing artists

136. 443 F. Supp. 849 (S.D.N.Y. 1978), reprinted in 17 INT'L LEGAL MAT'LS 720 (1978).

137. 443 F. Supp. at 852, 17 INT'L LEGAL MAT'LS at 721.

138. 441 F. Supp. 827 (D.D.C. 1977).

139. *Id.* at 831-32.

140. *Id.* at 831.

141. 78 Civ. 2451 (S.D.N.Y. Aug. 17, 1978) (slip op.).

142. *Id.*; see Brower, *supra* note 74, at 203 n.25.

143. 461 F. Supp. 609 (S.D.N.Y. 1978).

to the United States and the United Kingdom. Both the USSR and the Ministry of Culture claimed they were entities distinct from Gosconcert and thus not liable for its debts or commitments. The court, refusing to dismiss the complaint against these two defendants, noted the complaint alleged that the negotiations had been conducted by at least one official of the Ministry of Culture and that the contracts had been approved by the Ministry.¹⁴⁴

The FSIA may apply to international organizations as well as foreign states. In *Broadbent v. Organization of American States*¹⁴⁵ a former employee of the Organization of American States sued for an alleged breach of an employment contract. Although finding the FSIA inapplicable, the district court upheld the defense of immunity on the independent ground that international organizations are immune from legal process except insofar as that immunity is expressly waived by treaty or limited by statute.¹⁴⁶ This case is now on appeal before the United States Court of Appeals for the District of Columbia Circuit.¹⁴⁷ An amicus curiae brief filed by the United States in the appeal urges that the FSIA should govern suits brought against international organizations.¹⁴⁸ Nevertheless, the United States recommends affirmance of the lower court decision on the ground that the subject of the suit, management of an international organization's civil service, is not a commercial activity within the meaning of the FSIA.¹⁴⁹

The Organization of Petroleum Exporting Countries (OPEC) may not be sued under the Act according to *International Association of Machinists v. OPEC*.¹⁵⁰ The FSIA, it was reasoned, applies only to foreign sovereigns, and OPEC is not a sovereign.

Jurisdiction over questions involving employees was explored in *State Bank of India and Chicago Joint Board, Amalgamated Clothing and Textile Workers, AFL-CIO before the National Labor Relations Board*.¹⁵¹ Ninety-two percent of the State Bank of India's stock was owned by the Reserve Bank of India, which was in turn wholly owned by the Government of India. The Reserve Bank performed many functions similar to those of

144. *Id.* at 612.

145. No. 77-1974 (D.D.C. Mar. 28, 1978) (slip op.), cited in Brower, *supra* note 74, at 204 n.28.

146. *Id.* slip op. at 2.

147. No. 78-1465 (D.C. Cir., docketed May 25, 1978), cited in Brower, *supra* note 74, at 204 n.30.

148. Brief for the United States as Amicus Curiae, *Broadbent v. Organization of Am. States*, No. 78-1465 (D.C. Cir., filed Oct. 18, 1978), cited in Brower, *supra* note 74, at 204 n.31.

149. For a description of the amicus briefs filed by the United Nations and by the World Bank in this case, see Gordon, *A Review of Significant Recent Decisions, Legislative, Executive and Administrative Actions in the United States, and Abroad, and of Treaties and International Organization Developments*, 13 INT'L LAW. 371, 381 (1979).

150. 477 F. Supp. 553 (C.D. Cal. 1979).

151. 229 N.L.R.B. 838, 95 L.R.R.M. 1141 (1977), reprinted in 16 INT'L LEGAL MAT'L'S 853 (1977). See also S.K. Prods. Corp., 230 N.L.R.B. 1211, 95 L.R.R.M. 1498 (1977); Note, *International Law—Labor Law—N.L.R.B. Jurisdiction Over Foreign Sovereigns Operating Within the United States*, 12 J. INT'L L. & ECON. 459 (1978).

the United States Federal Reserve Bank, and the State Bank of India acted as agent of the Reserve Bank of India. Nevertheless, the NLRB successfully asserted jurisdiction over a dispute regarding the Chicago branch of the State Bank on the theory that the office "partakes of the nature of an instrumentality of commerce."¹⁵² Although the FSIA does not apply to administrative proceedings,¹⁵³ the NLRB referred to this statute to buttress its jurisdictional finding:

While we recognize that the Foreign Sovereign Immunities Act of 1976 affords judicial, not administrative, determinations of rights growing out of such activities, we believe that it is further support for our decision to treat foreign state enterprises coming within our jurisdiction as we would private individuals under like circumstances.¹⁵⁴

C. *Distinction Between Public and Commercial Activities*

The difficulty of determining which activities are commercial is not limited to the area of labor relations. Because the major exception from sovereign immunity is based upon commercial activities, the distinction between public and commercial activities is vital. The FSIA defines "commercial activity" as either "a regular course of commercial conduct or a particular commercial transaction or act."¹⁵⁵ The legislative intent reflected in the House Report suggests that the courts will have a great deal of latitude in determining what is a commercial activity.¹⁵⁶ Foreign governmental activities intended to be included within the ambit of commercial activity are sales of a service or product, leasing property, borrowing money, and purchases of securities in an American corporation.¹⁵⁷ The term "regular course of commercial conduct" includes the carrying on of a commercial enterprise such as an airline, a mineral extraction company, or a state trading corporation.¹⁵⁸ Even a single contract could constitute a "particular transaction or act."¹⁵⁹

The phrase "commercial activity" is defined by reference to the nature of the conduct or transaction rather than by reference to its purpose.¹⁶⁰ The broadest application of this nature of the activity test would afford immunity to the sovereign only when the act is of such nature that no party other than a government could perform such an act. Because an individ-

152. 16 INT'L LEGAL MAT'LS at 859.

153. See Brower, *supra* note 74, at 209; Brower, *Litigation of Sovereign Immunity Before a State Administrative Body and the Department of State: The Japanese Uranium Tax Case*, 71 AM. J. INT'L L. 438 (1977).

154. Case 13-RC-14061 (May 20, 1977), *reprinted in* 16 INT'L LEGAL MAT'LS at 865.

155. 28 U.S.C. § 1603(d) (1976).

156. H.R. REP. NO. 94-1487, *supra* note 38, at 16, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS at 6615, 17 INT'L LEGAL MAT'LS at 1407.

157. *Id.*

158. H.R. REP. NO. 94-1487, *supra* note 38, at 16, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS at 6614-15, 17 INT'L LEGAL MAT'LS at 1406.

159. *Id.*

160. 28 U.S.C. § 1603(d) (1976). This analysis is nearly identical to the governmental versus proprietary analysis used in determining the tort immunity of municipal corporations. See W. PROSSER, LAW OF TORTS 977-84 (4th ed. 1971).

ual can borrow money, a foreign state that borrows money would be considered as engaging in a commercial activity under this test. Conversely, because an individual cannot legislate, a state acts *jure imperii* when it passes legislation.¹⁶¹

The rejection of the purpose test by the FSIA renders questionable the continuing validity of *Victory Transport, Inc. v. Comisaria General de Abastecimientos y Transportes*.¹⁶² The court in that case considered both the nature and the purpose of the activity; consequently, the court classified public loans and acts "concerning the armed forces" as "political or public acts."¹⁶³ In contrast, the House Report states that a contract to make repairs on an embassy building or a contract to buy provisions or equipment for the armed forces would be a commercial activity.¹⁶⁴ In *National American Corp. v. Federal Republic of Nigeria*¹⁶⁵ the defendant claimed immunity in a suit based upon a contract for cement to be delivered in Nigeria, because some of the cement was intended for use in governmental works and military installations. The court held this transaction was a commercial arrangement, despite the possible military use. No convincing proof had been submitted at the trial to show that a major or substantial portion of the cement was procured with a governmental purpose in mind. Moreover, under the FSIA, the court stated the purpose of the purchase would be irrelevant.¹⁶⁶

On the other hand, property under the control of a military authority or defense agency, as well as property of a military character, is exempt from execution.¹⁶⁷ By restricting the plaintiff's right to execute on his judgment, this subsection may have the practical effect of adopting *Victory Transport's* classification of immunity with regards to "acts concerning the armed forces."¹⁶⁸

Ownership of the Windsor Park Towers apartment building by the East German Government was considered a commercial activity in *County Board of Arlington County v. Government of the German Democratic Republic*.¹⁶⁹ In contrast, the alleged libel in *Yessenin-Volpin* was treated as a governmental activity, rather than a commercial act.¹⁷⁰ In *United Euram*¹⁷¹ a cultural project of the Soviet Government to supply perform-

161. R. von Mehren, *supra* note 41, at 49.

162. 336 F.2d 354 (2d Cir. 1964) (agreement by defendant to arbitration in New York of disputes arising under its charter party with plaintiff constituted consent to jurisdiction); see R. von Mehren, *supra* note 41, at 52.

163. 336 F.2d at 360.

164. H.R. REP. NO. 94-1487, *supra* note 38, at 16, reprinted in [1976] U.S. CODE CONG. & AD. NEWS at 6615, 17 INT'L LEGAL MAT'LS at 1406.

165. 448 F. Supp. 622 (S.D.N.Y. 1978), reprinted in 17 INT'L LEGAL MAT'LS 1407 (1978).

166. 448 F. Supp. at 641-42, 17 INT'L LEGAL MAT'LS at 1416.

167. 28 U.S.C. § 1611(b)(2) (1976).

168. *Victory Transp., Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354, 360 (2d Cir. 1964); see R. von Mehren, *supra* note 41, at 61.

169. No. 78-293-A (E.D. Va., filed Sept. 6, 1978), reprinted in 17 INT'L LEGAL MAT'LS 1404 (1978).

170. 443 F. Supp. 849 (S.D.N.Y. 1978), reprinted in 17 INT'L LEGAL MAT'LS 720 (1978); see text accompanying note 78 *supra*.

171. 461 F. Supp. 609, 611 (S.D.N.Y. 1978).

ing artists was considered a commercial activity, but in *Gittler v. German Information Center*,¹⁷² work done on making films for the German Information Center was held to be a noncommercial diplomatic activity "in connection with fostering cultural relations and promoting understanding between Germany and the United States."

The question arises whether a foreign government's breach of a concession contract falls within the purview of the FSIA. In granting the concession, a government could be viewed as engaging in a commercial act. A subsequent expropriation of the concession would also involve a breach of that contract, which act might arguably be commercial. If the concession holder is a United States company with United States shareholders, it should be possible to demonstrate that such breach has a "direct effect on the United States."¹⁷³ On the other hand, in *Carey v. National Oil Corp.*,¹⁷⁴ where Libya had nationalized oil concessions, the court granted sovereign immunity to that nation because "nationalization is the quintessentially sovereign act, never viewed as having a commercial character."¹⁷⁵

Section 1605(a)(3), involving expropriations, however, does not make jurisdiction turn on a commercial-noncommercial dichotomy. Hence, could the breach of a concession contract provide the basis for a suit for expropriatory action under this subsection? This expropriation provision, however, presents another obstacle to suits on concession contracts. It applies only to cases involving "rights in property taken in violation of international law." While the phrase "rights in property" is not defined in the statute nor discussed in the House Report, the phrase "claim of title or other right to property" is used in the Hickenlooper Amendment,¹⁷⁶ which limits the application of the "act of state" doctrine in expropriation cases. The cases interpreting this amendment have consistently held that "claims of title or other right to property" do not extend to claims based on contracts.¹⁷⁷ An analogy to these Hickenlooper cases would point toward limiting the phrase "rights in property" in the FSIA to claims asserted against specific property. If this interpretation is followed, a claim based on breach of a concession agreement would not fall within section 1605(a)(3).¹⁷⁸

To what extent the United States antitrust laws are included within the concept of commercial activities in the FSIA is unsettled. In *Outboard Marine Corp. v. Pezetel*¹⁷⁹ the defendant entity, which was owned by the Polish Government, was sued for antitrust violations. The court held the

172. 95 Misc. 2d 788, 408 N.Y.S.2d 600, 601-02 (Sup. Ct. New York County 1978).

173. R. von Mehren, *supra* note 41, at 58.

174. 453 F. Supp. 1097 (S.D.N.Y. 1978).

175. *Id.* at 1102.

176. 22 U.S.C. § 2370(e)(2) (1976).

177. *Menendez v. Saks & Co.*, 485 F.2d 1355, 1372 (2d Cir. 1973), *cert. denied*, 425 U.S. 991 (1976); *French v. Banco Nacional de Cuba*, 23 N.Y.2d 46, 242 N.E.2d 704, 295 N.Y.S.2d 433 (1968); *see Occidental of Umm al Qaywayn, Inc. v. Cities Serv. Oil Co.*, 396 F. Supp. 461 (W.D. La. 1975).

178. R. von Mehren, *supra* note 41, at 60-61.

179. 461 F. Supp. 384 (D. Del. 1978).

alleged conduct fell within the category of commercial activities under the FSIA, pointing out that the House Report had indicated the FSIA was "not intended to alter application of the Sherman Antitrust Act . . . to any defendant."¹⁸⁰ Pezetel was also described as "some type of undefined association existing under the laws of Poland for the purpose of conducting a business in a state-controlled economy."¹⁸¹ Thus, Pezetel did not qualify as a foreign "state," but rather would be a "person" liable under the antitrust laws.¹⁸²

On the other hand, member nations of the Organization of Petroleum Exporting Countries (OPEC) are not persons within the meaning of the antitrust statutes, according to *International Association of Machinists v. OPEC*.¹⁸³ Thus, a foreign state can sue¹⁸⁴ but cannot be sued under the antitrust laws. In addition, this case held the conduct of the OPEC nations was not a commercial activity within the scope of section 1603(d).¹⁸⁵ These countries, when controlling production of and prices for crude oil, are establishing the terms and conditions for removal of natural resources from their territory. United Nations Resolution No. 1803,¹⁸⁶ with the concurrence of the United States, recognized the principle that a sovereign state has sole power to control its natural resources. Hence, the court concluded, the OPEC nations are engaged in "sovereign" activities, not commercial ones. This case is now being appealed.¹⁸⁷

In conversations, the author has found that a number of foreign attorneys believe the United Nations resolutions,¹⁸⁸ and cases such as *International Association of Machinists*, mean that no activities in the petroleum or natural resources industries will be treated as commercial. As far as United States courts are concerned, such a belief is probably mistaken. The *International Association of Machinists* decision pointed out that a distinction must be made between those activities that are of a sovereign or public nature and those that merely involve a government's proprietary interest. The basic objective, according to the court, is "to keep our courts

180. H.R. REP. NO. 94-1487, *supra* note 38, at 19, reprinted in [1976] U.S. CODE CONG. & AD. NEWS at 6618, 15 INT'L LEGAL MAT'LS at 1408.

181. 461 F. Supp. at 396.

182. Even if the foreign entity is characterized as a "person" under the antitrust laws, the suit may still be dismissed under the act of state doctrine. *Hunt v. Mobil Oil Corp.*, 550 F.2d 68 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977). For factors to be weighed in deciding whether to apply the doctrine, see *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1976), and Note, *Sherman Act Jurisdiction and the Acts of Foreign Sovereigns*, 77 COLUM. L. REV. 1247 (1977).

183. 477 F. Supp. 553 (C.D. Cal. 1979).

184. *Pfizer, Inc. v. India*, 434 U.S. 308 (1978).

185. 477 F. Supp. at 569.

186. G.A. Res. 1803 § I(1), 17 U.N. GAOR, 2d Comm'n 327, U.N. Doc. A/C 2/5 R 850 (1962).

187. Lehner, *Machinist Chief Talks a Blunt Radical Line, Wins Many Admirers*, Wall St. J., Nov. 28, 1979, at 1, col. 1, & at 24, col. 1.

188. See also Charter of Economic Rights and Duties of States, G.A. Res. 3281, ch. II, art. 2(1), U.N. Doc. A/RES/3281 (XXIX) (1974), and Declaration on the Establishment of a New International Economic Order in 1974, G.A. Res. 3201 (S-VI), § 4(e), U.N. GAOR, 6th Spec. Sess, Supp. (No. 1), 3 U.N. Doc. A/9559.

away from those areas that touch very closely upon the sensitive nerves of foreign countries.”¹⁸⁹ Under this reasoning, it is unlikely that foreign sovereigns will be accorded immunity in those situations where the law is relatively noncontroversial, such as ordinary tort cases or contract claims arising from the sale or delivery of goods.¹⁹⁰ Likewise, routine operating matters, such as letters of credit, oil tanker spills, and repayments of loans, should be classified as commercial. Conversely, immunity should be extended when a foreign government’s decision reflects an ideological preference; for instance, the choice of a nationalized petroleum industry over a private one.

D. *Venue*

The FSIA amends 28 U.S.C. § 1391 to establish four express provisions for venue in civil actions against foreign states or their instrumentalities. Suit may be brought in the judicial district where “a substantial part of the events or omissions giving rise to the claim occurred.”¹⁹¹ This provision is similar to 28 U.S.C. § 1391(e), which allows actions against the United States in the judicial district in which the “cause of action arose.” Section 1391(f)(1), however, is not intended to imply that only one such district is permissible in each case. Rather, in suits brought under section 1605(a)(2) involving commercial activities abroad that cause a direct effect in the United States, venue would exist wherever the direct effect generates a “substantial part of the events” that give rise to the claim.¹⁹² In cases involving property or rights in property, the suit may be brought in the district where a “substantial part of the property that is the subject of the action is situated.”¹⁹³ This venue provision is based on the reasoning that no hardship would be imposed on the foreign sovereign by subjecting it to suit where it has chosen to place the property that gives rise to the claim.¹⁹⁴

A suit in admiralty to enforce a maritime lien against a cargo or vessel of a foreign state may be brought in the judicial district where such cargo or vessel is located at the time notice is delivered.¹⁹⁵ An action against an agency or instrumentality of a foreign government may be brought in the judicial district where that agency or instrumentality is doing business or where it is licensed to do business.¹⁹⁶ A suit against a foreign state or political subdivision thereof may be brought in the district court for the District of Columbia.¹⁹⁷ As foreign nations have diplomatic representa-

189. 477 F. Supp. at 567.

190. Note, *supra* note 182, at 1254-56.

191. 28 U.S.C. § 1391(f)(1) (1976).

192. H.R. REP. NO. 94-1487, *supra* note 38, at 31-32, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS at 6630-31, 15 INT’L LEGAL MAT’LS at 1415.

193. 28 U.S.C. § 1391(f)(1) (1976).

194. H.R. REP. NO. 94-1487, *supra* note 38, at 32, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS at 6631, 15 INT’L LEGAL MAT’LS at 1415.

195. 28 U.S.C. § 1391(f)(2) (1976).

196. *Id.* § 1391(f)(3).

197. *Id.* § 1391(f)(4).

tives in Washington, D.C., this should be the most convenient place for them to defend.

Venue provisions may be waived by a foreign state; failure to object to improper venue in a timely manner constitutes such a waiver.¹⁹⁸ In addition, section 1391(f) does not apply to entities that are owned by a foreign state, but which are also citizens of the United States as defined in 28 U.S.C. §§ 1332(c) and (d).¹⁹⁹ Such entities are not agencies or instrumentalities within the scope of the Act, and thus may not insist on its venue requirements.

E. *Removal from State Courts*

Section 1441(d) of title 28 provides for the removal to a federal district court of suits brought in state courts against a foreign sovereign or its instrumentality. "In view of the potential sensitivity of actions against foreign states and the importance of developing a uniform body of law in this area, it is important to give foreign states clear authority to remove to a Federal forum actions brought against them in the State courts."²⁰⁰

The thirty-day time limit for removal imposed by 28 U.S.C. § 1446(b) may be extended at any time for "cause shown."²⁰¹ This transfer right, however, was denied in two cases that had been instituted in state courts prior to the effective date of the FSIA.²⁰² Concern was expressed that such a retroactive application of the Act might lead to removal of all pending cases, without regard to how far the proceeding had progressed.²⁰³

F. *Responsive Pleadings*

The foreign sovereign defendant is given sixty days from the time service is made to file an answer or other responsive pleading.²⁰⁴ This places the foreign government on a par with the United States Government with respect to the time to answer or reply.²⁰⁵

If, instead of being sued, a foreign sovereign initiates or intervenes in an action, sovereign immunity is lost for three types of claims related to the action. First, immunity is denied concerning any counterclaim for which

198. See FED. R. CIV. P. 12(h).

199. Such an entity might include a corporation organized and incorporated under the laws of a state. See *Amtorg Trading Corp. v. United States*, 71 F.2d 524, 526-29 (C.C.P.A. 1934). See also H.R. REP. NO. 94-1487, *supra* note 38, at 15, reprinted in [1976] U.S. CODE CONG. & AD. NEWS at 6614, 15 INT'L LEGAL MAT'LS at 1406.

200. *Herzberger v. Compania de Acero del Pacifico, S.A.*, 78 Civ. 2451 (S.D.N.Y. Aug. 17, 1978); H.R. REP. NO. 94-1487, *supra* note 38, at 32, reprinted in [1976] U.S. CODE CONG. & AD. NEWS at 6631, 15 INT'L LEGAL MAT'LS at 1415.

201. 28 U.S.C. § 1441(d) (1976).

202. *Martropico Compania Naviera S.A. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Pertamina)*, 428 F. Supp. 1035 (S.D.N.Y. 1977); *Rasu Maritima S.A. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 77 Civ. 263 (S.D.N.Y. Mar. 7, 1977) (memo endorsement).

203. *Martropico Compania Naviera S.A. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Pertamina)*, 428 F. Supp. 1035, 1038 (S.D.N.Y. 1977).

204. 28 U.S.C. § 1608(d) (1976).

205. FED. R. CIV. P. 12(a).

the foreign sovereign would not be entitled to immunity under section 1605 if the counterclaim had been brought as a direct claim in a separate action against the foreign state.²⁰⁶ Secondly, even if a foreign state would otherwise be entitled to immunity under sections 1604 to 1606, it is not immune from a counterclaim "arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state."²⁰⁷ When the foreign state brings or intervenes in an action based on a particular transaction or occurrence, it should not be able to invoke the benefit of litigating before United States courts while avoiding any legal liabilities asserted against it in those same courts, if such liability arises from the same transaction or occurrence.²⁰⁸ Finally, even if the foreign state is immune from a judgment under these first two situations, it is not immune from a setoff, to the extent the setoff does not exceed in amount or differ in kind from the relief sought by the foreign state.²⁰⁹

The FSIA does not expressly strip the foreign state of immunity from similar counterclaims when, as a defendant, the foreign state has asserted a cross-claim or issued a third-party complaint. Logic and fairness, however, dictate that a sovereign defendant filing a cross-claim or a third-party complaint should be equally subject to resulting counterclaims.²¹⁰

In November 1979 Iran filed suit in a New York state court against the deposed shah, Reza Pahlavi to recover \$61 million in compensatory and punitive damages for alleged misappropriation of funds. The complaint charges that the Pahlavi Foundation was merely a channel for diverting public money into private use. Having initiated this suit, the Government of Iran has opened itself to certain counterclaims and to setoffs. The Pahlavi Foundation reportedly holds interests in a number of private companies, such as National Cash Register in Iran.²¹¹ If one of those companies has a claim against the current government, what is the possibility of its asserting a counterclaim in this litigation?

G. *Nonjury Trials*

As in suits against the United States Government,²¹² actions against foreign sovereigns or their instrumentalities were intended by the drafters of the FSIA to be nonjury trials, on the ground that actions "tried by a court without jury will tend to promote a uniformity in decisions where foreign governments are involved."²¹³ Section 1330(a) of title 28 specifically grants original jurisdiction for nonjury trials only. Furthermore, section 1441(3) stipulates that upon removal from a state court, the federal court

206. 28 U.S.C. § 1607(a) (1976).

207. *Id.* § 1607(b).

208. *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 698 (1976).

209. 28 U.S.C. § 1607(c) (1976). *See also* *National Bank v. Republic of China*, 348 U.S. 356 (1955).

210. *Brower*, *supra* note 74, at 209.

211. *Wall St. J.*, Nov. 29, 1979, at 5, col. 1.

212. 28 U.S.C. § 2402 (1976).

213. H.R. REP. NO. 94-1487, *supra* note 38, at 13, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS at 6611-12, 15 INT'L LEGAL MAT'LS at 1405.

shall try the case "without a jury." Nevertheless, the court held in *Icenogle v. Olympic Airways, S.A.*²¹⁴ that the right to a jury trial still exists in suits against corporations owned by foreign governments when the action has been brought under section 1332(a)(2) instead of section 1330. Section 1332(a)(2) authorizes diversity jurisdiction in suits between citizens of a state and "foreign states or citizens or subjects thereof." Although the court conceded that nonjury trials were required in case of a removal from a state court under section 1441, no such requirement applied if the suit was initially commenced in a federal court under section 1332(a)(2).²¹⁵

H. Judgments

1. *Default Judgments.* No default judgment may be entered against a foreign state or its instrumentality "unless the claimant establishes his claim or right to relief by evidence satisfactory to the court."²¹⁶ This is the same rule that applies to default judgments against the United States.²¹⁷ In making the determination whether the plaintiff has proved his claim, the court should take into account the extent to which the plaintiff's case depends on appropriate discovery against the foreign state.²¹⁸ After a default judgment has been entered, the defendant must be so notified in the manner prescribed for service.²¹⁹

2. *Extent of Liability.* Tort liability of a foreign state or one of its political subdivisions under the Act does not extend to punitive damages.²²⁰ If, however, death has occurred and the applicable law would permit the recovery of only damages punitive in nature, the foreign state will be liable for actual or compensatory damages measured by the pecuniary injury resulting from death to the person for whose benefit the claim is asserted.²²¹ This prohibition against punitive damages does not apply, however, to suits against agents or instrumentalities of a foreign state.²²²

As discussed above, judgments enforcing maritime liens against foreign states may not exceed the value of the vessel or cargo, with value measured as of the date notice of suit was served.²²³

I. Execution of Judgments

A number of treaties of friendship, commerce, and navigation entered into by the United States permit execution of judgments against foreign

214. 82 F.R.D. 36 (D.D.C. 1979), *reprinted in* 18 INT'L LEGAL MAT'LS 963 (1979).

215. *Id.* at 38, 18 INT'L LEGAL MAT'LS at 967-68.

216. 28 U.S.C. § 1608(e) (1976).

217. FED. R. CIV. P. 55(e).

218. H.R. REP. NO. 94-1487, *supra* note 38, at 26, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS at 6625, 15 INT'L LEGAL MAT'LS at 1412.

219. 28 U.S.C. §§ 1608(a), (b), (c) (1976); *see* 22 C.F.R. § 93.2 (1979) (form for notice of default judgment); Appendix B.

220. 28 U.S.C. § 1606 (1976).

221. *Id.*

222. *Id.*

223. *Id.* § 1605.

publicly owned or controlled enterprises.²²⁴ The Brussels Convention for the Unification of Certain Rules Relating to the Immunity of State-Owned Vessels²²⁵ allows execution of judgments against public vessels engaged in commercial services in the same way as against privately owned vessels. Although the United States is not a party to this treaty, this country follows a policy of not claiming immunity for its publicly-owned merchant vessels.²²⁶ The Geneva Convention on the Territorial Sea and the Contiguous Zone,²²⁷ to which the United States does belong, recognizes the liability to execution, under appropriate circumstances, of state-owned vessels used in commercial service. Aside from these situations, however, the United States has in the past taken the position that property of foreign states is absolutely immune from execution.²²⁸

The FSIA substantially changes this rule. Property of a foreign state used for a commercial activity in the United States is now subject to execution or attachment in aid of execution under the circumstances set forth in the statute.²²⁹ The term "attachment in aid of execution" includes "attachments, garnishments, and supplemental proceedings available under applicable Federal or State law for satisfaction of a judgment."²³⁰

In determining whether execution is permissible, one should first note that certain types of property continue to be immune from execution. Funds of a foreign central bank or monetary authority held for its own account in the United States are exempt from execution or attachment, unless immunity has been expressly waived.²³¹ The term "held for its own account" refers to funds used or held in connection with central banking activities, as distinguished from funds used solely to finance the commercial transactions of other entities.²³² This exemption was believed necessary to avoid discouraging the deposit of foreign funds within the United States.²³³ Moreover, execution against the reserves of a foreign state could cause serious foreign relations problems.²³⁴

In addition to the above immunity, property of a foreign state is immune from execution if the property is "of a military character" or "under the control of a military authority or defense agency."²³⁵ According to the

224. See, e.g., Treaty of Friendship, Commerce, & Navigation, Apr. 2, 1953, United States-Japan, 4 U.S.T. 2063, T.I.A.S. No. 2863.

225. Apr. 10, 1926, 196 L.N.T.S. 199.

226. See 46 U.S.C. §§ 742, 747, 781 (1976); H.R. REP. NO. 94-1487, *supra* note 38, at 27, reprinted in [1976] U.S. CODE CONG. & AD. NEWS at 6626, 15 INT'L LEGAL MAT'LS at 1412.

227. April 29, 1958, arts. 20 & 21, 15 U.S.T. 1606, T.I.A.S. No. 5639.

228. *Dexter & Carpenter, Inc. v. Kunglig Jarnvagsstyrelsen*, 43 F.2d 705 (2d Cir. 1930); *Weilamann v. Chase Manhattan Bank*, 21 Misc. 2d 1086, 192 N.Y.S.2d 469, 473 (Sup. Ct. Westchester County 1959).

229. 28 U.S.C. §§ 1609-1611 (1976).

230. H.R. REP. NO. 94-1487, *supra* note 38, at 28, reprinted in [1976] U.S. CODE CONG. & AD. NEWS at 6627, 15 INT'L LEGAL MAT'LS at 1413; see FED. R. CIV. P. 69.

231. 28 U.S.C. § 1611(b)(1) (1976).

232. H.R. REP. NO. 94-1487, *supra* note 38, at 31, reprinted in [1976] U.S. CODE CONG. & AD. NEWS at 6630, 15 INT'L LEGAL MAT'LS at 1414.

233. *Id.*

234. *Id.*

235. 28 U.S.C. § 1611(b)(2) (1976).

legislative history of the FSIA, property is considered of a military character if it consists of equipment in the broad sense: weapons, ammunition, tanks, warships, etc.²³⁶ Both the character and the function of the property must be military. Also exempt from execution is other military property, such as food, clothing, fuel, and office equipment that, although not of a military character, is essential to military operations.²³⁷ "Control" means authority over disposition and use, in addition to physical control. These exceptions are intended to avoid the possibility of a foreign state's reciprocally executing against military property of the United States abroad.²³⁸

Section 1610(a) covers execution against property of a foreign state. By comparison, the more liberal provisions of section 1610(b) apply only to executions of judgments against an agency or instrumentality of a foreign state. Only property of a foreign state "used for" a commercial activity in the United States is subject to execution under section 1610(a). Section 1605(a)(2), the provision that confers jurisdiction for actions based on commercial activity,²³⁹ uses the term "in connection with" a commercial activity. It is not clear whether these two phrases are intended to have different meanings. The words "in connection with" appear to have a broader reach than "used for." Thus, under the "use" test for execution, would the property actually have to be operated here, or would a mere passive holding of property be sufficient? The answer to this question must be left to the courts.²⁴⁰

Once the initial hurdle of locating commercial property of the foreign state within the United States is overcome, the plaintiff must then attempt to fit such property into one of the five categories under which execution is allowed. The first category permits execution if the defendant state has explicitly or implicitly waived its immunity from execution.²⁴¹ Such waivers could consist of an applicable provision in a treaty, a contractual stipulation, or an official statement.²⁴² Secondly, execution is available against property that "is or was used" by the foreign state for a commercial activity in the United States, provided that the commercial activity gave rise to the claim upon which the judgment is based.²⁴³ This exception also includes any commercial activity that gives rise to a maritime lien in connection with an admiralty suit brought under section 1605(b). Execution may likewise be had against commercial property other than the vessel or cargo that is the subject of a suit under section 1605(b) if such property is used in

236. H.R. REP. NO. 94-1487, *supra* note 38, at 31, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS at 6630, 15 INT'L LEGAL MAT'LS at 1415.

237. *Id.*

238. *Id.*

239. See text accompanying notes 53-69, 155-78 *supra*.

240. R. von Mehren, *supra* note 41, at 62.

241. 28 U.S.C. § 1605(a)(1) (1976).

242. H.R. REP. NO. 94-1487, *supra* note 38, at 28, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS at 6627, 15 INT'L LEGAL MAT'LS at 1413.

243. 28 U.S.C. § 1605(a)(2) (1976).

the same commercial activity upon which the maritime lien was based.²⁴⁴ The phrase "is or was used" in section 1610(a)(2) covers the possibility that property may have been transferred from the commercial activity forming the basis of the suit in an effort to avoid process of the court.²⁴⁵

The third category of property subject to execution is that used by a foreign state for a commercial activity in the United States when the "execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law."²⁴⁶ This section may be interpreted as applying only to claims against specific property; thus, its usefulness may be confined to situations in which movable property has been nationalized and thereafter has been used by the nationalizing state for a commercial purpose in the United States.²⁴⁷

The fourth exception to immunity from execution involves a judgment determining rights in real property located in the United States that was acquired by gift or succession.²⁴⁸ Judgments establishing rights in such property may be executed if the property is used by the foreign state in a commercial activity. Embassies and related buildings are not deemed property used for a commercial activity.²⁴⁹ Diplomatic and consular missions, as well as the residences of chiefs of such missions, are also not subject to execution.²⁵⁰ Finally, execution may be had against proceeds of a liability insurance policy owned by the foreign state.²⁵¹ After judgment, such obligations are treated as property of the foreign state subject to garnishment or related procedures in accordance with the applicable state or federal law. This exception to immunity was intended to facilitate recovery by individuals injured in accidents involving vehicles owned by a foreign state.²⁵²

The broader provisions of section 1610(b) apply only to a judgment rendered against an agency or instrumentality of a foreign state. In this situation execution is permitted if the agency or instrumentality has waived its immunity or if the judgment relates to a claim for which the agency or instrumentality is not immune under sections 1605(a)(2), (a)(3), or (a)(5), or section 1605(b).²⁵³ Under this subsection execution against an agency or instrumentality does not require that the attached property be commercially used. Moreover, no nexus is needed between the claim upon which the judgment is rendered and the property against which execution is

244. H.R. REP. NO. 94-1487, *supra* note 38, at 28, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS at 6627, 15 INT'L LEGAL MAT'LS at 1413.

245. *Id.*

246. 28 U.S.C. § 1610(a)(3) (1976).

247. R. von Mehren, *supra* note 41, at 63-64.

248. 28 U.S.C. § 1610(a)(4)(A) (1976).

249. H.R. REP. NO. 94-1487, *supra* note 38, at 29, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS at 6628, 15 INT'L LEGAL MAT'LS at 1413.

250. 28 U.S.C. § 1610(a)(4)(B) (1976).

251. *Id.* § 1610(a)(5).

252. H.R. REP. NO. 94-1487, *supra* note 38, at 29, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS at 6628, 15 INT'L LEGAL MAT'LS at 1413.

253. 28 U.S.C. § 1610(b) (1976).

sought.²⁵⁴ Section 1610(b), however, will not permit execution against the property of one agency or instrumentality to satisfy a judgment against another agency or instrumentality.²⁵⁵ Congress reasoned that the failure of United States law to respect the separate juridical identities of different agencies or instrumentalities might encourage foreign nations to disregard the juridical divisions between different United States corporations or between a United States corporation and its independent subsidiary.²⁵⁶

J. *Pre-Judgment Attachments For Security Purposes*

The question of pre-judgment attachments for purposes other than acquiring jurisdiction is not directly addressed in the FSIA. Under sections 1609 and 1610, the property of a foreign state is immune from attachment or arrest except for certain commercial property subject to "attachment in aid of execution." The House Report states that the term "in aid of execution" refers to measures necessary to "obtain satisfaction of a *judgment*."²⁵⁷ Section 1610(a) provides that no attachment shall be permitted until "*after . . . a reasonable period of time has elapsed following the entry of judgment.*" Both the language and the legislative history of the Act seem to indicate that, as a general rule, foreign sovereigns should be immune from pre-judgment attachments. In *Behring International, Inc. v. Imperial Iranian Air Force* the court concluded that section 1610(b) did not waive the defendant's immunity from pre-judgment attachment.²⁵⁸

Pre-judgment attachments are, however, permitted under section 1610(d) if two conditions can be satisfied: (1) the foreign state must have explicitly waived such immunity, and (2) the purpose of the attachment must be to secure payment of a judgment that may be rendered. In the *Behring* case the issue was whether the Treaty of Amity with Iran constituted such a waiver. Article XI, paragraph 4 of that Treaty provides: "No enterprise of either High Contracting Party . . . shall, if it engages in commercial activities within the territories of the other, . . . claim or enjoy . . . immunity . . . from . . . suit, execution of judgment *or other liability*" ²⁵⁹ The court decided that this language was not an explicit waiver within the meaning of section 1610(d). Nevertheless, the *Behring* court concluded that the defendant had waived its immunity from pre-judgment attachment. The FSIA does not abrogate any preexisting treaties, as indicated, for example, by the language in section 1609: "Subject to existing international agreements." Thus, the court reasoned that the Treaty of Amity stands on its own, independent of the FSIA; consequently, the sec-

254. *Id.* § 1610(b)(2).

255. *See* *Prelude Corp. v. Owners of F/V Atlantik*, A.M.C. 2651 (N.D. Cal. 1971).

256. H.R. REP. NO. 94-1487, *supra* note 38, at 29-30, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS at 6628-29, 15 INT'L LEGAL MAT'LS at 1414.

257. H.R. REP. NO. 94-1487, *supra* note 38, at 28, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS at 6627, 15 INT'L LEGAL MAT'LS at 1413 (emphasis added).

258. *Opinion Maintaining Restraints*, Civ. No. 79-675 (D.N.J., filed July 24, 1979), *reprinted in* 18 INT'L LEGAL MAT'LS 1370 (1979), and *Opinion Authorizing Writ of Attachment* (D.N.J., filed Aug. 13, 1979), *reprinted in* 18 INT'L LEGAL MAT'LS 1389 (1979).

259. 8 U.S.T. 901, T.I.A.S. No. 3888 (1955) (emphasis added).

tion 1610(d) requirement of an *explicit* waiver did not apply to the Treaty. Since the words "execution of judgment" preceded the term "or other liability" in the Treaty, the latter was construed as referring to situations other than attachment after judgment. Thus, pre-judgment attachments were considered authorized.²⁶⁰ This decision is now on appeal.²⁶¹

In *Reading & Bates Corp. v. National Iranian Oil Co.*²⁶² the court stated that whenever the purpose of an attachment is not to obtain jurisdiction, but rather to secure assets, a different analysis should apply. "It is a harsh remedy which should be construed strictly against those seeking to use it,"²⁶³ and should be granted "only upon a showing that drastic action is required for security purposes."²⁶⁴ The court refused to issue the attachment in this case because the possibility of the defendant removing its more than \$700 million on deposit in the United States "is simply too remote."²⁶⁵ Although the request was dismissed on this ground, the court went on to criticize the *Behring* decision. In the "interest of consistent policy," a waiver of immunity from pre-judgment attachments "should be explicit whether it be by statute or by international agreement."²⁶⁶ "Apparently Congress recognized that pre-judgment attachments are potentially more harassing than post-judgment attachments and therefore, a waiver of immunity . . . should not be lightly applied."^{266a} Since it was the friction created by jurisdictional attachments that prompted Congress to eliminate them in the FSIA, the position taken by the *Reading* court seems more consistent with the policy underlying the FSIA.

K. Injunctions

Fearing that no assets might remain in the United States against which a judgment could be executed, the plaintiff in *Electronic Data Systems*²⁶⁷ sought a preliminary injunction prohibiting the defendants from removing or transferring funds belonging to the Government of Iran from the Marine Midland Bank in New York City. Finding a distinction between an attachment and an injunction, the trial court issued the preliminary injunction on the ground that the legislative history of section 1606 indicates an injunction may be granted in cases where "clearly appropriate."²⁶⁸ The

260. Opinion Maintaining Restraints, Civ. No. 79-675 (D.N.J., filed July 24, 1979), reprinted in 18 INT'L LEGAL MAT'LS 1370 (1979).

261. *Id.*, 18 INT'L LEGAL MAT'LS at 1369.

262. 79 Civ. 4421 (KTD), (S.D.N.Y. Sept. 27, 1979), reprinted in 18 INT'L LEGAL MAT'LS 1398 (1979).

263. *Id.*, 18 INT'L LEGAL MAT'LS at 1402.

264. *Id.*, 18 INT'L LEGAL MAT'LS at 1403 (quoting *Incontrade, Inc. v. Oilborn Int'l, S.A.*, 407 F. Supp. 1359, 1361 (S.D.N.Y. 1976)).

265. *Id.*, 18 INT'L LEGAL MAT'LS at 1405.

266. *Id.*, 18 INT'L LEGAL MAT'LS at 1408.

266a. *Id.*

267. *Electronic Data Sys. Corp. Iran v. Social Sec. Org. of Iran*, No. CA-3-79-218-F (N.D. Tex. June 21, 1979) (memorandum opinion granting preliminary injunction).

268. H.R. REP. NO. 94-1487, *supra* note 38, at 22, reprinted in [1976] U.S. CODE CONG. & AD. NEWS at 6621, 15 INT'L LEGAL MAT'LS at 1410.

current political instability supported a finding that unless the injunction were issued, there was a danger of irreparable harm to the plaintiff.

Finally, the court concluded that the funds in question were the kind of property against which a final judgment in this case could be executed. The Government of Iran argued that the money involved actually belonged to the Ministry of Defense of Iran and thus was exempt from execution under section 1611(b)(2)(B). The House Report stated that this provision was "intended to protect other military property, such as food, clothing, fuel and office equipment. . . ."²⁶⁹ This enumeration of specific items led the court to conclude that this exception was intended to apply only to tangible goods and not to money. Yet no such limitation on the word "property" appears in the statute. One dictionary defines "property" as "everything which is the subject of ownership, corporeal or incorporeal, tangible or intangible, visible or invisible, real or personal; everything that has an exchangeable value or which goes to make up wealth or estate."²⁷⁰ Certainly cash and bank accounts should qualify as "property" under this definition.

Nevertheless, under the principle of statutory construction, "expressio unius est exclusio alterius," the express statutory mention of certain things impliedly excludes others not mentioned.²⁷¹ Although this maxim is considered a useful guide in determining legislative intent in some situations, in other cases it serves no purpose, especially if the legislative aim appears to be to the contrary.²⁷² The enumeration involved here is not even contained in the statute, but rather in the House Report. Moreover, the Report explains that section 1611(b)(2)(B) is meant to cover property which, "although not a military character is essential to military operations."²⁷³ Certainly, money is necessary for military activities. Since the purpose of this subparagraph is to prevent retaliatory execution against property of the American military abroad, it would seem equally important to protect the funds needed to equip and supply our armed forces. Thus, the court's ruling that section 1611(b)(2)(B) applies only to tangible property seems unwarranted.

As indicated above, the property of one agency or instrumentality may not be used to satisfy a judgment against another.²⁷⁴ Since the Ministry of Defense was not a party to this suit, it was argued that these funds were immune from attachment or execution. This money had originally been deposited in the Bank Sepah in an account held by the Iranian Air Force and Navy. Subsequently, the funds were transferred to the Marine Midland Bank in the name of the Government of Iran. Stating that this prop-

269. *Id.* at 31, [1976] U.S. CODE CONG. & AD. NEWS at 6630, 15 INT'L LEGAL MAT'LS at 1414.

270. BLACK'S LAW DICTIONARY 1382 (rev. 4th ed. 1968) (quoting *Samet v. Farmers' & Merchants' Nat'l Bank*, 247 F. 669, 671 (4th Cir. 1917)).

271. E.g., *Bloemer v. Turner*, 281 Ky. 832, 137 S.W.2d 387 (1939).

272. E.g., *Collins v. Russell*, 114 F.2d 334 (8th Cir. 1940).

273. H.R. REP. NO. 94-1478, *supra* note 38, at 31, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS at 6630, 15 INT'L LEGAL MAT'LS at 1414.

274. 28 U.S.C. § 1610(b) (1976).

erty was "under the control" of the state of Iran, rather than the military authorities,²⁷⁵ the court referred to the statement in the House Report that the courts would determine "whether property held by one agency should be deemed to be property of another" and "whether property held by an agency is property of the foreign state."²⁷⁶

Although action may well lie against the Social Security Organization and Ministry of Health and Welfare in this case, the possibility still exists that the suit against the Government of Iran may be barred on the ground that any interference by it with contractual rights falls within section 1605(a)(5)(B).²⁷⁷ If this occurs, the prohibition against using the property of one agency to satisfy a judgment against another would seem to preclude execution against these funds, whether they belong to the Government of Iran or to the Ministry of Defense, to satisfy any judgment against the Social Security Organization or the Ministry of Health and Welfare.

Finally, the court reasoned that this property was available for execution under section 1610(a)(1) since Iran had waived its immunity in the Treaty of Amity.²⁷⁸ This subparagraph, however, does not apply unless the foreign state's property is also being "used for a commercial activity in the United States."²⁷⁹ There was no indication in this opinion that these funds were being used for a commercial activity in the United States; without such a finding, the property should be immune from execution.

Laying aside these technical objections, the more basic issue in *Electronic Data Systems* is whether a federal court in Texas may enjoin a foreign sovereign from transferring assets located in New York when no final judgment has yet been rendered. Certainly the threatened harm must appear grave to a plaintiff who has reason to believe a foreign government may remove its property from the United States before any judgment can be secured. It has long been established that once personal jurisdiction is secured, a court may use its equity power to order a defendant to perform certain actions in reference to property in another state.²⁸⁰ When the defendant is personally before the court, such a decree can be enforced in personam through the process of contempt.²⁸¹ If, however, the res is outside the court's power, a decree involving property located in another jurisdiction need not be recognized by the courts in the situs state.²⁸²

Whether the injunction in this case legally affects the funds in New York is open to question. First, no service had been made on the Government of Iran at the time the injunction was issued, although counsel for the de-

275. *Electronic Data Sys. Corp. Iran v. Social Sec. Org. of Iran*, No. CA-3-79-218-F, at 14-15 (N.D. Tex. June 21, 1979) (memorandum opinion granting preliminary injunction).

276. H.R. REP. NO. 94-1487, *supra* note 38, at 28, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS at 6627, 15 INT'L LEGAL MAT'LS at 1413.

277. *See* notes 80-82 *supra* and accompanying text.

278. *See* notes 48-49 *supra* and accompanying text.

279. 28 U.S.C. § 1610(a) (1976).

280. *Penn v. Lord Baltimore*, 1 Vesey Senior 444 (Ch. 1750), *reprinted in* Z. CHAFEE & E. RE, CASES AND MATERIALS ON EQUITY 68 (5th ed. 1967).

281. *Id.*

282. *Fall v. Eastin*, 215 U.S. 1 (1909).

fendant had participated in the proceedings.²⁸³ Secondly, it is not clear how the issuing court's order could be enforced in a contempt proceeding. Imprisoning a foreign official or diplomat is not permissible for those nations that abide by "the general principles of law recognized by civilized nations."²⁸⁴ A fine for violating the injunction may also be unenforceable.²⁸⁵ Finally, this decree did not try to affect the funds directly; rather it was aimed at the defendant. Such an injunction may be worthless against a foreign sovereign that chooses to remove assets anyway, unless the second American state is willing to recognize the decree on some theory of comity.²⁸⁶

The very attractiveness and flexibility of this particular remedy may call for judicial self-restraint, especially if an injunction is to be issued against a foreign sovereign. As one judge has said, "I have always felt . . . that extreme danger attends the exercise of this part of the jurisdiction of the court, and that it is a jurisdiction which is to be exercised with extreme caution. . . ."²⁸⁷

One should also inquire whether issuing a preliminary injunction is consistent with the public policy underlying the FSIA. In the analysis of section 1606 on "Extent of Liability," the House Report states that a court may, in appropriate circumstances, "order an injunction or specific performance."²⁸⁸ The statute itself refers to punitive damages and compensatory damages; injunctions and specific performance are added as forms of relief in the House Report. All these are remedies which imply that liability has already been established. Only after such a determination can the appropriate remedy be selected. Since this paragraph in the House Report seems concerned with the nature of relief a final judgment should provide, it would seem preferable to interpret the word "injunction" in this context as referring to injunctive relief given as part of a final judgment. Preliminary injunctions would not be included under this interpretation.²⁸⁹ Moreover, the reason for eliminating attachments as a means of securing jurisdiction was to avoid friction with foreign governments. If American courts can now use injunctions to restrict a foreign sovereign's disposition

283. *Electronic Data Sys. Corp. Iran v. Social Sec. Org. of Iran*, No. CA-3-79-218-F (N.D. Tex. June 21, 1979) (memorandum opinion granting preliminary injunction).

284. Statute of the International Court of Justice, art. 38.1(c), T.S. 993; *see* Vienna Convention on Diplomatic Relations, *supra* note 24; Vienna Convention on Consular Relations (entered into force for the United States Dec. 24, 1969), 21 U.S.T. 325, 596 U.N.T.S. 261.

285. H.R. REP. NO. 94-1487, *supra* note 38, at 22, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS at 6621, 15 INT'L LEGAL MAT'LS at 1410.

286. *See McElreath v. McElreath*, 162 Tex. 190, 345 S.W.2d 722 (1961) (foreign decree recognized on basis of comity making consideration of the full faith and credit clause unnecessary).

287. Cottenham, C. in *Brown v. Newall*, 2 Myl. & C. 558, 570 (1837), *reprinted in* Z. CHAFEE & E. RE, *supra* note 281, at 819.

288. H.R. REP. NO. 94-1487, *supra* note 38, at 22, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS at 6621, 15 INT'L LEGAL MAT'LS at 1410.

289. In *International Ass'n of Machinists & Aerospace Workers v. Organization of Petroleum Exporting Countries*, 477 F. Supp. 553 (C.D. Cal. 1979), the court refused to issue a preliminary injunction against defendant's price setting activities; such relief was considered inappropriate on the basis of an incomplete record without a full hearing.

of its own assets, a new source of irritation is spawned and a prime objective of the FSIA circumvented.

L. *Impact of Foreign Assets Control Regulations on the FSIA*

Any question about the validity of the injunction in *Electronic Data Systems* became moot when the Treasury Department froze all assets of the Iranian Government located within the United States on November 14, 1979 by promulgating the Iranian Assets Control Regulations,²⁹⁰ under the authority of the International Emergency Economic Powers Act.²⁹¹ Section 535.201 of those regulations provides that no property within the United States in which Iran "has any interest of any nature whatsoever may be transferred, paid, exported, withdrawn or otherwise dealt in . . ." without a Treasury license.²⁹² Thus, any judgment obtained by the *Electronic Data Systems* case cannot be executed against Iran's assets, and the injunction pending in this case becomes superfluous.²⁹³

The announcement by the Iranian Foreign Minister that his nation would not pay foreign debts of the former regime triggered efforts by a number of American banks to attach Iranian assets.²⁹⁴ On November 23,

290. 31 C.F.R. pt. 535, 44 Fed. Reg. 65,956 (1979).

291. 50 U.S.C. §§ 1701-1706 (Supp. I 1977). Previously, the basic statutory authority for the foreign assets control regulations was the Trading With the Enemy Act ch. 106, § 5(b), 40 Stat. 411, 415 (1917).

292. 31 C.F.R. § 535.201 (1979).

293. Interview of Nov. 26, 1979, with Dennis M. O'Connell, Acting Chief Counsel, Office of Foreign Assets Control, U.S. Dep't of Treasury.

294. Wall St. J., Nov. 27, 1979, at 6, col. 1. In addition, Morgan Guaranty Trust Company of New York obtained an order from a court in Essen, West Germany, permitting the bank to attach Iran's 25% interest in Fried Krupp G.m.b.H., as well as Iran's 25% interest in Deutsch Babcock, A.G., a machinery manufacturer. The value of the Krupp interest attached is about \$100 million. Morgan has sought this attachment in connection with a default upon a \$40 million loan made as part of a \$500 million credit package assembled by a syndicate of eleven banks. The holdings of Iran in these West German companies could be used to satisfy this debt. Morgan's actions reportedly caused grave concern among West German bankers and businessmen who fear they will be dragged into the United States-Iranian conflict. *Id.*, Nov. 29, 1979, at 5, col. 1.

Moreover, at the request of Chemical Bank of New York, a court in the United Kingdom has enjoined the Government of Iran, the Bank Markazi Iran, and the Iranian Central Bank from removing any assets from Great Britain. Chemical Bank sought this injunction on the ground that the Iranian Government had defaulted on a \$50 million loan that formed part of a \$500 million syndicated credit. Reportedly, the injunction will be lifted if the Iranian Government or Bank Markazi posts \$51 million in security or in an acceptable bond. *Id.*, Dec. 6, 1979, at 2, col. 2; see Delaume, *The State Immunity Act of the United Kingdom*, 73 AM. J. INT'L L. 185 (1979). Previously, Bank Markazi had asked the British court to order the London branches of five American banks to repay deposits blocked by the United States regulations. These suits asked for payment of \$1.8 billion by the Bank of America in San Francisco, \$415 million by Manufacturers Hanover Trust Co. of New York, \$332 million by Bankers Trust Co. of New York, \$321 million by Chase Manhattan Bank, and \$175 million by Citibank of New York.

Bank Markazi also filed suit in a Paris court against Citibank for its refusal to return a \$50 million deposit placed in Citibank's French affiliate. French authorities have made it clear that any dispute concerning such funds will be governed by French law. Wall St. J., Dec. 6, 1979, at 2, col. 2. Should Citibank be ordered by the Paris court to return the funds, the Bank may have one obligation under French law and a conflicting duty under United States law. The Iranian Assets Control Regulations apply to any property "in the possession of or

the Treasury Department added section 535.504 to the Iranian Foreign Assets Control Regulations. This provision permits judicial proceedings to be instituted with respect to the frozen property,²⁹⁵ but does not authorize "the entry of judgment" or execution of judgment against such blocked assets.²⁹⁶ Hence, any judgments which may be secured will give no rights in the blocked assets until, and if, they are unfrozen.²⁹⁷ Pursuant to this revised Treasury regulation, a federal court in Milwaukee on November 30 responded to a plea of the First Wisconsin Bank by ordering the attachment of certain deposits belonging to the Iranian government.²⁹⁸ The FSIA, however, was not raised as an issue during the hearing on this matter,²⁹⁹ and this attachment may well contravene the Act.

In *E-Systems v. Islamic Republic of Iran*³⁰⁰ the plaintiff has requested foreclosure against two Boeing 707's to satisfy a \$7.7 million lien for labor and materials provided while working on these planes. Since the aircraft are still in possession of E-Systems, the Iranian Assets Control Regulations would appear to cover this situation as well. Section 535.201 prohibits transfer of Iranian government property "in the possession or control of persons subject to the jurisdiction of the United States" without a Treasury license. "Property" is defined by the regulations to include "goods" and

control of persons subject to the jurisdiction of the United States." 31 C.F.R. § 535.201 (1979). In *Fruehauf Corp. v. Massardy*, Fruehauf-France, S.A., which was two-thirds owned by an American corporation, had made a contract to deliver sixty vans to Automobiles Berliet for eventual delivery to the Peoples' Republic of China. [1965] Gazette du Palais II, Jur. 86, [1968] D.S. Jur. 147. The United States Treasury Department issued an order to the American parent to cause Fruehauf-France, S.A., to suspend execution of this contract as a violation of the United States Foreign Asset Control Regulations prohibiting trade with Communist China. The minority directors of Fruehauf then sued the American directors of Fruehauf-France and the American parent corporation in a French court. Holding the contract valid, the French court appointed an administrator for Fruehauf-France for three months to execute the contract. This decision was affirmed by the Court of Appeals in Paris in 1965. *Fruehauf Corp. v. Massardy*, [1965] Gazette du Palais II, Jur. 86, [1968] D.S. Jur. 147, reprinted in H. STEINER & D. VAGTS, *TRANSNATIONAL LEGAL PROBLEMS: MATERIALS AND TEXT* 1225 (2d ed. 1976).

The Treasury Department had based jurisdiction in the *Fruehauf* case upon § 500.329 of the Foreign Asset Control Regulations, which provides that the term "person subject to the jurisdiction of the United States" includes "(3) any corporation organized under the laws of the United States or of any State." The same language appears in the Iranian regulations. 31 C.F.R. § 535.329 (1979). In the *Fruehauf* case, the United States Treasury ultimately ruled that the American parent could not control the situation because of the appointment of the French administrator. The trailers were delivered, the regular manager reinstated, and relations with the Berliet company restored. H. STEINER & D. VAGTS, *supra*, at 1226. Administration of the foreign asset controls is subject to political considerations. For examples where such factors have determined whether a special license would be issued, see *id.* at 1223.

295. 31 C.F.R. § 535.504(a), 44 Fed. Reg. 67,617 (1979).

296. *Id.* §§ 535.504(b)(1) & (2).

297. See also Wall. St. J., Nov. 27, 1979, at 6, col. 1.

298. *Id.*, Dec. 3, 1979, at 2, cols. 3 & 4.

299. Interview of Dec. 4, 1979, with Judy Spangler, law clerk to Judge John W. Reynolds, United States District Court of Wisconsin.

300. No. CA-3-79-1487 (N.D. Tex., complaint filed Dec. 5, 1979). In addition, the plaintiff sought the termination of a guaranty issued by Bank Melli in favor of the Imperial Iranian Government, Ministry of War, as well as the cancellation of performance letters of credit issued by the Bank of America in favor of Bank Melli.

“chattels,” as well as “liens.”³⁰¹ Thus, it would appear that the district court may not at this time foreclose the liens against these planes.

Even after the Iranian assets are unblocked, these various plaintiffs may not recoup the entire amount of their claims. In blocking assets of a foreign government, the United States has several objectives. First, the target state is deprived of the use of the property. Secondly, the United States acquires an economic weapon helpful in future bargaining with that country. Finally, freezing assets ensures preservation of resources from which private American claims against that nation may eventually be paid. In addition to Iran, blocking regulations since 1950 have been issued against the assets of the People's Republic of China, North Korea, Vietnam, Cambodia,³⁰² Rhodesia,³⁰³ and Cuba.³⁰⁴

Past experience indicates that blocked assets are often relinquished by the foreign government in exchange for diplomatic recognition or some other advantage. Such property may consequently be transferred to the United States government for eventual distribution to private American citizens holding claims against the foreign state.³⁰⁵ Since the total amount

301. 31 C.F.R. § 535.311, 44 Fed. Reg. 65,956 (1979).

302. 31 C.F.R. pt. 500 (1978) (China and North Korea); 29 Fed. Reg. 6,025 (1964), amending 31 C.F.R. § 500.201 (North Vietnam); 40 Fed. Reg. 17,262 (1975), amending 31 C.F.R. § 500.201 (Cambodia); and 40 Fed. Reg. 19,202 (1975), amending 31 C.F.R. § 500.201 (1975) (South Vietnam). The freeze against Cambodia affects \$10 million in assets, against Vietnam \$100 million, and against China \$80 million. The blockade of Chinese assets is scheduled to be lifted in January 1980. Wall St. J., Nov. 16, 1979, at 29, col. 1.

303. 31 C.F.R. pt. 530 (1975). The statutory authority for the Rhodesian Sanctions Regulations was § 5 of the United Nations Participation Act of 1945, 22 U.S.C. § 287c (1976). Section 287c(a) provides authority for the President to implement decisions of the Security Council of the United Nations. This authority was delegated to the Secretary of the Treasury in Exec. Order 11419, 3 C.F.R. 737 (Cum. Supp. 1966-1970). These Rhodesian sanctions were lifted by President Carter on Dec. 17, 1979. Wall St. J., Dec. 17, 1979, at 1, col. 3. The United Nations also lifted its trade embargo against that country in December 1979. Wall St. J., Dec. 27, 1979, at 24, col. 2.

304. 31 C.F.R. pt. 515 (1978). The legislative authority for the Cuban regulations is found both in the Trading with the Enemy Act, ch. 106, § 5, 40 Stat. 411, 415 (1917), and the Foreign Assistance Act of 1961, 22 U.S.C. § 2370(a) (1976). For a full discussion of all these foreign asset controls, see Sommerfield, *Treasury Regulation of Foreign Assets and Trade*, in A LAWYER'S GUIDE TO INTERNATIONAL BUSINESS TRANSACTIONS 265 (W. Surrey & D. Wallace, Jr. eds., 2d ed. 1977).

305. For example, due to hostilities in Europe, property belonging to Hungarian nationals and located within the United States was blocked on Apr. 10, 1940. The subsequent 1947 Peace Treaty with Hungary stipulated that such blocked property would vest in the United States Government. Thereafter, the International Claims Settlement Act of 1949, 22 U.S.C. §§ 1621-1644m was amended by Pub. L. No. 84-285, § 302, 69 Stat. 567, 571 (1955) in 1955 to provide that these resources would be used to compensate American citizens who had claims against the Governments of Hungary, Bulgaria, or Romania arising out of the war, the nationalizations, or contract rights. 8 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 952 (1967).

During the negotiation on the recognition of the Soviet Union by the United States in 1933, the Litvinov Assignment was concluded. Under this agreement all amounts owed to the U.S.S.R. by American nationals were assigned by the Soviet Union to the United States Government. *United States v. Pink*, 315 U.S. 203 (1942); *United States v. Belmont*, 301 U.S. 324 (1937). Subsequently, the United States distributed these funds to American citizens with claims based upon nationalization of their property situated within the Soviet Union.

In 1965 Congress amended the International Claims Settlement Act to institute a claims program to protect rights of American citizens who had suffered losses in Cuba under the

of assets available is usually insufficient to cover all the claims, each claimant receives only a pro rata share. Hence, the companies now suing Iran may end up in a pool with other American claimants against that nation. Rather than full satisfaction of any judgment, partial payment may be the maximum recoverable.³⁰⁶

M. *Retroactivity of Statute*

It is unclear to what extent the FSIA may be retroactively applied. Section 1602 provides that the Act shall take effect ninety days after its enactment date of October 21, 1976. The House Report states that this ninety-day period is necessary to give adequate notice of the Act and its detailed provisions to all foreign states. In response to the provisions of the Act that changed the previous United States position concerning execution against the property of a foreign government, the State Department issued a Notice stating that it did "not contemplate changing this policy in the period before January 19, 1977."³⁰⁷ As already indicated, two decisions have already declined to apply the removal provisions of the statute retroactively.³⁰⁸ In *Martropico* the court refused to apply the Act retrospectively because "the very wording of section 1330(a) that the 'district courts shall have original jurisdiction' is prospective."³⁰⁹

Nevertheless, the Yessenin-Volpin decision in 1978 indicated that the

Castro Government. 79 Stat. 988 (1965). The Foreign Claims Settlement Commission was charged with adjudicating these individual claims before they became stale. The Commission was also to determine the total amount involved to provide a definite sum for use in any future negotiations that might take place between the United States and Cuba. All claims had to be filed prior to May 31, 1967. Sutton, *American Claims Against Cuba*, 3 INT'L LAW. 741 (1969). As of November 1979, the Commission had certified 5,900 claims, amounting to \$1.8 billion. U.S. Dep't of State, *Gist*, Nov. 1979. No money is yet available to pay these awards. Presumably, any recognition of the Cuban Government by the United States will entail a partial settlement of these claims, perhaps with utilization of the blocked Cuban assets for this purpose.

In exchange for the unblocking of Chinese assets by the United States, China agreed to pay the United States \$80.5 million as the full and final settlement of all claims by the United States or its citizens against China arising from nationalization after Oct. 1, 1949. The United States Government has exclusive authority to distribute this \$80.5 million. Agreement Between the Government of the United States of America and the Government of the People's Republic of China Concerning the Settlement of Claims, arts. I, II, and IV (May 11, 1979), *reprinted in* 18 INT'L LEGAL MAT'LS 551 (1979).

306. With such a prospect, the question arises, is it worthwhile for a plaintiff suing Iran to proceed to judgment? No absolute answer is possible. Obtaining a final judgment would serve to preserve evidence and testimony. On the other hand, if Congress establishes a program under the International Claims Settlement Act (*see note 305 supra*), will the plaintiff have to undergo a proceeding analogous to a trial de novo by the Claims Commission? Or will a court judgment be recognized and enforced by that Commission without further examination?

307. U.S. Dep't of State Notice of Nov. 10, 1976, *reprinted in* 71 AM. J. INT'L L. 342 (1977); *see note 228 supra* and accompanying text.

308. *Martropico Compania Naviera S.A. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Pertamina)*, 428 F. Supp. 1035 (S.D.N.Y. 1977); *Rasu Maritima S.A. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 77 Civ. 263 (S.D.N.Y. Mar. 7, 1977) (memo endorsement); *see notes 202-03 supra* and accompanying text.

309. 428 F. Supp. at 1037 (emphasis in original).

statute could be applied retroactively.³¹⁰ Retroactive application of the legislation in that case, however, served to protect the foreign governmental entity by characterizing it as an agency or instrumentality entitled to immunity from suit under sections 1605(a)(2) and (5)(B).³¹¹ The language of the court in *Yessenin-Volpin* concerning retroactivity was repeated in several subsequent cases. For instance, the court in *Upton v. Empire of Iran*³¹² applied the Act retrospectively, concluding that the "direct effect" test of section 1605(a)(2) had not been satisfied and therefore the foreign state was immune from suit.³¹³

The greatest confusion about retroactivity of the statute arises in the area of jurisdiction. In *National American Corp. v. Federal Republic of Nigeria*³¹⁴ the plaintiff, prior to the effective date of the Act, had attached property belonging to the defendant. After the Act became effective, the plaintiff was unable to correct certain defects in the previous attachment because attachment was no longer available as a ground for jurisdiction. In order that the plaintiff might continue his action, the court applied the in personam provisions of the statute retroactively and stated: "It follows that once jurisdictional attachments have been eliminated, *in personam* jurisdiction under the Act would be the only means of asserting jurisdiction, regardless of whether the events underlying the suit occurred prior to the effective date of the Act."³¹⁵ Nevertheless, because this case had been litigated throughout on the assumption that only quasi in rem jurisdiction was asserted, the court limited the plaintiff's claim to the amount of the funds attached.³¹⁶

In a subsequent case, *Amoco Overseas Oil Co. v. Compagnie Nationale Algerienne de Navigation*,³¹⁷ the court of appeals refused to give retroactive effect to the jurisdictional provisions of the Act when the defendant attacked the validity of an attachment made prior to the effective date of the Act. Distinguishing this situation from the one in *National American*, the court pointed out that the retroactive application of the Act in *National American* had not interfered with antecedent rights.³¹⁸

Although reaching different results on the question of retroactivity, both *National American* and *Amoco* achieve fairness in upholding the rights of

310. *Yessenin-Volpin v. Novosti Press Agency*, 443 F. Supp. 849, 851 n.1 (S.D.N.Y. 1978), *reprinted in* 17 INT'L LEGAL MAT'LS 720 (1978). The court reasoned:

[A]pplying the Immunities Act to the instant case will give effect to the congressional intent and will not interfere with the antecedent rights of the parties Indeed, insofar as the Immunities Act alters the rights of parties, it does so by expanding the ability of plaintiffs to obtain satisfaction of judgments against foreign states.

Id.

311. *Id.* at 854.

312. 459 F. Supp. 264, 265 (D.D.C. 1978), *reprinted in* 18 INT'L LEGAL MAT'LS 103 (1979) (airport roof in Tehran collapsed on United States citizens).

313. *Id.* at 266.

314. 448 F. Supp. 622 (S.D.N.Y. 1978), *reprinted in* 17 INT'L LEGAL MAT'LS 1407 (1978).

315. *Id.* at 639, 17 INT'L LEGAL MAT'LS at 1413.

316. *Id.*

317. No. 79-7135 (2d Cir. July 19, 1979) (slip op.).

318. *Id.*

plaintiffs who had pursued the then legal means available for securing jurisdiction over a foreign sovereign before enactment of the statute. A more difficult situation arises when suit is initiated prior to the effective date of the Act, but no attachment is effected because the foreign sovereign had no property within that state. In *Insurance Co. of North America & Crystal Boat Co. v. Marina Salina Cruz*³¹⁹ the plaintiff commenced an action against the Government of Mexico before the enactment of the statute for work done on an American-owned ship in a Mexican naval shipyard. The ship sank near the coast of Alaska in 1974. As no property of the Mexican Government or of its navy was located in Alaska, no attachment was effected. Should the FSIA be applied retroactively in this situation to assert in personam jurisdiction over the foreign state? The judge in the lower court did not decide this question, relying instead on the Alaska long-arm statute to assert personal jurisdiction over the defendant.³²⁰ Mexico, as defendant, has appealed on the grounds that a state long-arm statute is not applicable to a foreign government and that the long-arm provisions of the FSIA should not be applied retroactively.³²¹

The United States Supreme Court, in *McGee v. International Life Insurance Co.*,³²² allowed the retroactive application of California's long-arm statute on the ground that this legislation was "remedial . . . and neither enlarged nor impaired substantive rights."³²³ The *McGee* case, however, seems distinguishable from *Crystal Boat* in several important respects. First, the Supreme Court in *McGee* appeared to be thinking primarily in domestic terms, as indicated by the following passage:

[E]xpanding the permissible scope of state jurisdiction . . . is attributable to the fundamental transformation of *our national* economy over the years With this increasing nationalization of commerce has come a great increase in the amount of business . . . across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.³²⁴

It is questionable whether the same justifications of ease in communication and transportation or the increased flow of business are equally present between a state and a foreign government, such as Alaska and Mexico. Moreover, in *McGee* the collection of premiums, one of the enumerated bases of jurisdiction, had continued after the enactment of the long-arm statute. Thus, the set of factors in *McGee* is sufficiently complex so that its upholding of retroactive application of the long-arm statute should not be construed as controlling interpretation of the FSIA.³²⁵

McGee justified the retroactive application of the long-arm statute on

319. No. 79-4050 (D. Alaska, filed Aug. 4, 1976).

320. No. A76-165 (D. Alaska Aug. 11, 1977) (memorandum and order).

321. Brief for Appellee, No. 79-4050 (9th Cir., filed June 1, 1979).

322. 355 U.S. 220 (1957).

323. *Id.* at 224.

324. *Id.* at 222-23.

325. Note, *Retroactive Expansion of State Court Jurisdiction Over Persons*, 63 COLUM. L. REV. 1105, 1117 (1963).

the ground it was only a change in procedure, not an expansion of substantive rights. This substance-procedure distinction has been criticized in recent years. "Use of the substance-procedure dichotomy has not been helpful"³²⁶ The confusion produced by the substance-procedure distinction was stressed in *Nevins v. Revlon, Inc.*: "Where a statute may greatly affect the position of the parties, it will not be construed retrospectively. . . . '[T]o supply a remedy where previously there was none of any kind is to create a right of action.'"³²⁷ The court concluded that the state long-arm statute could not be applied retroactively: "It seems to the court that with the situation at hand we are not dealing with a procedural matter. . . . The right given under the statute is a *fundamental* one. It is a substantive right. It must be and is hereby construed as operating prospectively."³²⁸

To a large extent, the FSIA might also be characterized as creating substantive or fundamental rights that greatly affect the position of the parties. Previously, a foreign government could employ its diplomatic resources to seek a recommendation from the State Department that the court dismiss a particular case on the ground of sovereign immunity.³²⁹ Usually, the courts deferred to the Department's suggestion of immunity.³³⁰ These diplomatic channels have now been closed to foreign governments by the Act's substitution of objective judicial standards to determine jurisdiction.³³¹ In addition, mechanical application of the substance-procedure distinction to the retroactivity question fails to take into account the fact that procedural law may induce reliance. More recent decisions have indicated that long-arm statutes should not be applied retroactively against a litigant who justifiably acted in reliance on some provision in the prior law.³³² As the judge in one case stated: "In order to apply the Immunities Act retrospectively this Court would be required to assess whether such application interfered with antecedent rights and, if so, whether such interference was 'the unequivocal and inflexible import of the terms, and the manifest intention of the legislature.'"³³³

Prior to the enactment of the FSIA, foreign sovereigns that had assets located within a state of the United States had reason to know they might be subjected to suit in that state, but they had no reason to expect they might be called on to defend an action in a state where they had no property. Had this possibility been known, they might have refrained from the

326. *Id.* at 1119.

327. 23 Conn. Supp. 314, 182 A.2d 634, 636 (Super. Ct. 1962) (testing retroactive application of Connecticut long-arm statute).

328. *Id.* (emphasis added).

329. See note 15 *supra* and accompanying text.

330. *Republic of Mexico v. Hoffman*, 324 U.S. 30 (1945); *Ex parte Republic of Peru*, 318 U.S. 578 (1943).

331. H.R. REP. NO. 94-1487, *supra* note 38, at 7, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS at 6605-06, 15 INT'L LEGAL MAT'LS at 1401-02.

332. *Nelson v. Miller*, 11 Ill. 2d 378, 143 N.E.2d 673 (1957); *Hunt v. Nevada State Bank*, 285 Minn. 77, 172 N.W.2d 292 (1969), *cert. denied*, 397 U.S. 1010 (1970).

333. *Amoco Overseas Oil Co. v. Compagnie Nationale Algerienne de Navigation*, 459 F. Supp. 1242, 1248 (S.D.N.Y. 1978).

conduct or transaction that gave rise to the claim. One commentator summarizes the possible injustice of retroactive application of a long-arm statute:

as the relationship between defendants and the state becomes more attenuated, thereby reducing the state's need to protect its citizens, and as the likelihood of the defendants' reliance on the prior lack of jurisdiction increases, situations may arise in which exercise of jurisdiction so opposes "traditional notions of fair play" that due process is violated.³³⁴

N. *Interrelation with Act of State Doctrine*

The House Report on the FSIA acknowledged that once the defense of sovereign immunity is removed, the act of state doctrine may be improperly asserted in an effort to block litigation.³³⁵ Under the act of state doctrine, American courts may refuse to adjudicate the validity of a purely public act of a foreign sovereign committed and effected within its own territory.³³⁶ In *Alfred Dunhill of London, Inc. v. Republic of Cuba*³³⁷ the Supreme Court held that the "concept of act of state should not be extended to include the repudiation of a purely commercial obligation."³³⁸ Congress thus decided it was unnecessary to address the act of state doctrine in the FSIA legislation since our courts "already have considerable guidance enabling them to reject improper assertions of the act of state doctrine."³³⁹ Therefore, the act of state doctrine should not apply to cases in which a commercial activity involves significant jurisdictional contacts with the United States.³⁴⁰ Following this reasoning, the court in *National American*³⁴¹ refused to apply the act of state doctrine to bar plaintiff's suit under the FSIA.

IV. USE OF WAIVERS IN TRANSNATIONAL CONTRACTS

The foregoing survey of case law under the FSIA reveals some divergence in positions taken by lower federal courts.³⁴² In view of these differences, an attorney involved in a transaction with a foreign government may be well advised to include a favorable venue selection clause in the

334. Note, *supra* note 325, at 1123.

335. H.R. REP. NO. 94-1487, *supra* note 38, at 20 n.1, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS at 6618-19, 15 INT'L LEGAL MAT'LS at 1408.

336. *Id.*

337. 425 U.S. 682 (1976).

338. *Id.* at 695.

339. *See* note 335 *supra*.

340. *Id.*

341. *National Am. Corp. v. Federal Rep. of Nigeria*, 448 F. Supp. 622 (S.D.N.Y. 1978), *reprinted in* 17 INT'L LEGAL MAT'LS 1407 (1978).

342. *Compare* *Yessenin-Volpin v. Novosti Press Agency*, 443 F. Supp. 849 (S.D.N.Y. 1978), *with* *Edlow Int'l Co. v. Nuklearna Elektrarna Krsko*, 441 F. Supp. 827 (D.D.C. 1977) (socialist state enterprise as agency or instrumentality or not); *compare* *Gittler v. German Information Center*, 95 Misc. 2d 788, 408 N.Y.S.2d 600 (Sup. Ct. New York County 1978), *with* *United Euram Corp. v. Union of Soviet Socialist Republics*, 461 F. Supp. 609 (S.D.N.Y. 1978) (cultural programs as public activity or commercial activity).

agreement. Although the Act does not contain any provision on venue waiver, the House Report states that "venue in any court could be waived by a foreign state."³⁴³ In addition, under the FSIA a number of other contractual waivers would be recognized and could be valuable in enforcing rights against a foreign state or its instrumentality. Examples include an explicit waiver of immunity with respect to jurisdiction of United States courts, an express waiver to attachment in aid of execution, and a waiver to immunity from execution itself. Of special importance in light of the *Electronic Data Systems* case would be an explicit waiver of immunity from attachment prior to judgment in accord with section 1610(d). These waivers may be accompanied by an express submission to the jurisdiction of certain courts in the United States and to an agreed procedure for service of process. Following is such a draft waiver clause:³⁴⁴

Any legal action or proceedings with respect to this Agreement may be brought in the United States District Court for the _____ District of _____ [state], and by execution and delivery of this Agreement, the _____ [foreign state or entity] hereby accepts, for itself and in respect of its property, generally and unconditionally the nonexclusive jurisdiction of such court and hereby waives any objection that it may now or hereafter have to the laying of venue of such actions or proceedings in such court. The _____ [foreign state or entity] hereby designates, appoints and empowers the Consul of the _____ [foreign state or entity] from time to time in _____ [city] to receive, for and on behalf of the _____ [foreign state or entity], service of process in such action or proceedings commenced by _____ [the contracting party] in the United States District Court for the _____ District of _____ [state] (which service shall be deemed completed and effective as from ten days after delivery thereof to said person). It is understood that a copy of such process served on such person will be promptly forwarded by airmail by _____ [the contracting party] to the _____ [foreign state or entity] at its address appearing in section _____, but the failure of the addressee to receive such copy shall not affect in any way the service of such process on the said person (as the agent of the _____ [foreign state or entity]). The _____ [foreign state or entity] further irrevocably consents to the service of such process in such action or proceeding by the mailing of copies thereof by registered or certified airmail, postage prepaid, to the _____ [foreign state or entity] at its address appearing in section _____, such service to be deemed completed and effective as from thirty days after such mailing. Nothing contained herein shall affect the right to serve process in any manner permitted by law or to commence any legal action or proceeding in any other jurisdiction.

The _____ [foreign state or entity] hereby irrevocably waives any immunity to which it might otherwise be entitled now or in the future in any action or proceedings in any court of general jurisdiction, within or outside its territory, with respect to this Agreement, from jurisdiction and from the execution or enforcement of any judgment or other

343. H.R. REP. NO. 94-1487, *supra* note 38, at 32, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS at 6631, 15 INT'L LEGAL MAT'LS at 1415; *see* R. von Mehren, *supra* note 41, at 55.

344. *See* R. von Mehren, *supra* note 41, at 56.

relief obtained in such an action or proceedings, including attachment prior to judgment for the purpose of securing satisfaction of any judgment that has been or may be entered against the foreign state or entity.

V. SOME PRACTICAL PROBLEMS AND FUTURE DIRECTIONS

Three years of accumulated experience under the FSIA have disclosed some practical difficulties that may not have been anticipated by its drafters. At least, no discussion of these situations was included in the House Report.

The first problem involves a suit against a foreign sovereign when there is clearly no jurisdiction in United States courts under the FSIA. In *Aquino Robles v. Mexicana de Aviacion* several American citizens sued the Mexican airline company, the national Government of Mexico, and the Government of Mexico City in a Commonwealth court in San Juan, Puerto Rico for an alleged false imprisonment in Mexico City by the Mexican authorities.³⁴⁵ Such an act is clearly governmental in nature, not commercial. Furthermore, having occurred outside the United States, the conduct is also excluded from the torts covered in section 1605(a)(5). Thus, neither under prior law nor the FSIA does an American court have jurisdiction over this case.

The vexing question was, what recourse was open to the Mexican Government. Before the FSIA, the Mexican Ambassador could have requested the United States State Department to interpose a defense of sovereign immunity; there is no reason to think that the Department would have refused in such a clearcut case. With the passage of the FSIA, however, the State Department is deprived of this authority, and the author was informed by an attorney in the Legal Adviser's Office that the State Department could do nothing to assist Mexico in *Aquino Robles*.³⁴⁶ Mexico then investigated the possibility of retaining local counsel in Puerto Rico. Fees for such American legal services were estimated at \$100 per hour or approximately \$10,000 in total. Mexican officials understandably objected to spending such a sum for a case that should never have been brought in the United States in the first place. Thus, the search began for a less expensive way of bringing the FSIA's protective features to the attention of the court.

A Mexican lawyer in the Foreign Ministry who was familiar with the FSIA prepared a Special Motion to Dismiss, which described the bases for jurisdiction under section 1605 and demonstrated that none of these grounds existed. Likewise, the motion pointed out that service had not been effected in accord with section 1608. This attorney and the Mexican

345. No. 77-50 (Tribunal Superior de Puerto Rico, Sala de San Juan, filed July 20, 1977).

346. The Department of State has stated that after the FSIA takes effect the Department "will not make any sovereign immunity determinations," although it may "appear as amicus curiae in cases of significant interest to the Government." E. McDOWELL, 1976 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 325.

Consul in San Juan then met with the judge outside the courtroom and presented the motion. Subsequently, the case was dismissed.³⁴⁷

How should similar cases coming before other federal courts be handled? When an activity of a foreign sovereign arguably falls within the section 1605 jurisdictional provisions, requiring that government to employ a local lawyer to defend seems reasonable. If, however, the conduct involved is clearly outside the court's jurisdiction, then compelling a sovereign defendant to retain American counsel imposes an unjustified burden on foreign nations, especially those third world countries whose financial resources are limited.

If the foreign sovereign enters no appearance, a federal court must, on its own motion if necessary, determine in every case whether jurisdiction exists.³⁴⁸ Moreover, section 1608(e) of the FSIA provides that no default judgment may be rendered unless the claimant has established "his claim or right to relief by evidence satisfactory to the court." In *International Association of Machinists v. OPEC*³⁴⁹ neither OPEC nor its member nations chose to appear. Convinced that the plaintiff had not shown by a preponderance of the evidence that it was entitled to relief, the court concluded that under section 1608(e) no default judgment could be entered.³⁵⁰ Under a different set of facts a court could also decide on its own that the activity for which a foreign sovereign is being sued does not satisfy the jurisdictional requirements of section 1605; accordingly, the complaint could be dismissed without appearance.

Although a judge may take judicial notice of the FSIA, ordinarily judges rely on opposing counsel to bring to their attention the appropriate sources of the law.³⁵¹ The problem faced by the foreign government not wishing to retain American counsel is how to bring the pertinent provisions of the FSIA to the attention of the court. The *Aquino Robles* case suggests a way to resolve this difficulty. Any person duly authorized by the foreign ministry of the defendant nation or by its embassy in Washington, D.C. should be allowed to appear on behalf of that government concerning certain preliminary questions, such as adequacy of the service under section 1608 and bases for jurisdiction under section 1605. Such a person may or may not be a lawyer either here or abroad; this should be a matter of discretion for the foreign government. The agent appearing for the foreign government should submit evidence of his authority to act, signed by either the Ambassador to the United States or the Minister of Foreign Affairs.³⁵²

347. Interview of Oct. 5, 1979, with Ricardo Abarca Landero, Chief of the Division of Foreign Litigation, Ministry of Foreign Relations, Mexico. *Aquino Robles v. Mexicana de Aviacion*, No. 77-5036 (802) (Tribunal Superior de Puerto Rico, Sala de San Juan, filed Oct. 16, 1978) (motion for reconsideration filed Aug. 28, 1979).

348. *Warner v. Hawaii*, 206 F.2d 851, 852 (9th Cir. 1953).

349. 477 F. Supp. 553 (C.D. Cal. 1979).

350. *Id.* at 574.

351. C. McCORMICK, *HANDBOOK OF THE LAW OF EVIDENCE* § 335, at 776 (2d ed. 1972).

352. *See Victory Transp., Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354 n.7 (2d Cir. 1964).

A second issue is whether the procedure as outlined above would conform to the rules of the federal courts. Section 1654 of Title 28 of the United States Code provides that "parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, is permitted" If the representative of the sovereign defendant is a lawyer in another nation, does he qualify as counsel under this section? A survey of the rules of a few of the principal courts reveals that, as a general rule, out-of-state counsel may appear *pro hac vice* for a specific case; usually a local attorney of record is also required. In every jurisdiction examined, however, this privilege is accorded only to lawyers admitted to a bar within the United States.³⁵³ Thus, it seems unlikely that an attorney from another nation could appear *pro hac vice*, even on behalf of his own government.

Alternatively, this suggested approach might be justified under section 1654 on the theory that the foreign government is conducting its case "personally," and that since a government is not a physical being, it can speak only through a designated representative. There are cases holding that private corporations,³⁵⁴ the United States Government,³⁵⁵ and a municipal corporation³⁵⁶ cannot be represented *pro se*. These decisions, however, seem to be predicated on the need to protect the legal entity involved against loss or damage from incompetent representation by laymen. In contrast, it would seem officious to force such protection on a foreign sovereign that has deliberately elected to appear *pro se* through its own authorized agent.

Federal Judge Herbert Will recently accused a leading Washington, D.C. law firm of "errant conduct" and "scavenging" in asking for a twenty-five percent fee for the routine filing of a claim form.³⁵⁷ To ensure that foreign governments are not forced to pay such unnecessary fees for American legal services in routine matters such as the *Aquino Robles* case, our courts should be liberal in allowing a foreign sovereign to appear *pro se*, at least on the threshold issues of jurisdiction and service.

In addition, under the FSIA a danger exists that jurisdictional concepts developed for private United States' citizens and corporations may be mechanically applied to foreign sovereigns. The House Report on the FSIA³⁵⁸ refers to *International Shoe*³⁵⁹ as establishing the test against which jurisdiction may be measured. This case, however, has produced a multitude of progeny, some of whose notions of jurisdiction seem quite

353. Federal Local Court Rules; see, e.g., S.D.N.Y.R. 4; S.D. CAL. R. 110-3(d); D.C.R. 1-4; P.R.R. 4-C.

354. *Phillips v. Tobin*, 548 F.2d 408 (2d Cir. 1976); *Globe Leasing, Inc. v. Engine Supply and Machine Service*, 437 S.W.2d 43 (Tex. Civ. App.—Houston [1st Dist.] 1969 no writ). See also *Turner v. American Bar Ass'n*, 407 F. Supp. 451 (N.D. Tex. 1975); *Dennett v. First Continental Inv. Corp.*, 559 S.W.2d 384 (Tex. Civ. App.—Dallas 1977, no writ).

355. *United States v. Onan*, 190 F.2d 1 (8th Cir.), cert. denied, 342 U.S. 869 (1951).

356. *Niklaus v. Abel Constr. Co.*, 164 Neb. 842, 83 N.W.2d 904 (1957).

357. NAT'L L.J., Oct. 8, 1979, at 10, col. 4.

358. H.R. REP. NO. 94-1487, *supra* note 38, at 13, reprinted in [1976] U.S. CODE CONG. & AD. NEWS at 6612, 15 INT'L LEGAL MAT'LS at 1405.

359. 326 U.S. 310 (1945).

strange to jurists in other nations. A number of scholars have commented on this problem. Hay and Walker write: "[W]hat may be appropriate in a national setting may amount to the exercise of exorbitant jurisdiction in the international context."³⁶⁰ This same preoccupation has been mirrored by A. Von Mehren and Trautman, who state:

[I]n establishing bases for jurisdiction in the international sense, a legal system cannot confine its analysis solely to its own ideas of what is just, appropriate, and convenient. . . . Conduct that is overly self-regarding with respect to the taking and exercise of jurisdiction can disturb the international order and produce political, legal, and economic reprisals.³⁶¹

Ehrenzweig and Jayme have likewise urged American courts to "take into account the potentially disastrous consequences for international intercourse, which may well result from retaliation for [an] . . . unlimited . . . claim to jurisdiction."³⁶²

For a court in Oregon to assert long-arm jurisdiction over a California corporation is somewhat different from Kansas' assumption of jurisdiction over a company organized and operating in Thailand. When a court in Hawaii asserted jurisdiction over a British defendant in *Duple Motor Bodies, Ltd. v. Hollingsworth*,³⁶³ Judge Ely dissented for the following reasons:

The extension of . . . [our] "long-arm" statute so that it stretches half-way around the world to grab the alien appellant brings to mind a caricature of Blind Justice with arms of rubber! I see such a caricature as depicting, and the majority's opinion as constituting, an implausible denial of due process as well as an unnecessary intrusion into the field of international relations. . . . [M]y Brothers seem to overlook the fact that every cited case deals with suits against American corporations and that the rationales of those cases are tailored to fit the needs of interstate commerce within this Country. . . . [T]hose cases . . . do not, and cannot, deal with the problem of the jurisdiction of an American state over an English corporation.³⁶⁴

He concluded that overly broad jurisdictional claims "in a case such as this will necessarily have an adverse effect on our Country's international relations."³⁶⁵ If this is true when a private foreign company is involved, a fortiori these comments also apply when jurisdiction over a foreign sovereign is asserted.

Within the United States certain grounds for jurisdiction exist that often are not acceptable in other nations. For instance, state long-arm statutes³⁶⁶ usually list "doing business in the state" as a basis for jurisdiction.

360. Hay & Walker, *The Proposed Recognition-of-Judgments Convention Between the United States and the United Kingdom*, 11 TEX. INT'L L.J. 421, 430-31 (1976).

361. A. von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1127 (1966).

362. 2 A. EHRENZWEIG & E. JAYME, PRIVATE INTERNATIONAL LAW 33 (1973) (footnote omitted).

363. 417 F.2d 231 (9th Cir. 1969).

364. *Id.* at 236.

365. *Id.* at 239.

366. See, e.g., TEX. REV. CIV. STAT. ANN. art. 2031b, § 3 (Vernon 1964 & Supp. 1980).

Similarly, carrying on a commercial activity within the United States qualifies as a jurisdictional ground under the FSIA.³⁶⁷ In most civil law countries, jurisdiction lies where a contract is made or performed.³⁶⁸ In addition, a corporation may be sued at its seat, or "siege," for any cause of action. A seat may be loosely described as the company's headquarters or principal place of business. Further, civil law nations generally provide that a corporation may be sued where it has a branch or an establishment, but usually only for claims arising out of the activity of that branch or establishment.³⁶⁹

The civil law and the American approach can produce different results, as demonstrated in *Bryant v. Finnish National Airlines*.³⁷⁰ The plaintiff, who had been injured in an airport in France, sued the Finnish airline in New York. The defendant was not incorporated in the United States; it had no officers, directors, nor shareholders in the United States; and it operated no flights in this country. The defendant did maintain a one-and-one-half room office for publicity purposes in New York, but it sold no tickets there. It is most unlikely that a civil law court would have found any basis for jurisdiction in New York upon such facts. The tort occurred in France, the defendant had no seat in New York, and the claim did not arise out of any activity of the New York office. The American court, however, concluded it had jurisdiction because the defendant was "doing business" in New York within the meaning of the long-arm statute.³⁷¹ To many other countries, this result would constitute an excessive jurisdictional claim.

The nations negotiating the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters³⁷² attempted to deal with this problem of exorbitant jurisdictional claims. In drafting the article describing those judgments entitled to enforcement in other member states, the framers stipulated that recognition would not be required if the original court had based its jurisdiction on the "fact that the defendant carried on business within the territory of the State of origin, unless the action arises from that business . . ." ³⁷³ Similarly, the Draft Convention Between the United States and the United Kingdom Providing for the Reciprocal Recognition and Enforcement of Judgments in Civil Matters³⁷⁴ would compel recognition of each other's judgment when jurisdiction has been based on the place of a branch or establishment, but only

367. 28 U.S.C. § 1605(a)(2) (1976).

368. R. SCHLESINGER, *COMPARATIVE LAW: CASES, TEXT, MATERIALS* 291 (1970).

369. *Id.* at 288.

370. 15 N.Y.2d 426, 208 N.E.2d at 439, 260 N.Y.S.2d 625 (1965).

371. *Id.* at 432, 208 N.E.2d at 441, 260 N.Y.S.2d at 629.

372. 1966, *reprinted in* 5 INT'L LEGAL MAT'LS 636 (1966), and 15 AM. J. COMP. L. 362 (1967).

373. *Id.*, Supplemental Protocol § 4.

374. Articles 10(c) and (e), Suggested Revisions of September 1978 Text of Draft U.K.-U.S. Judgments Convention, Summary Minutes on the Meeting of the Sub-Group on the Recognition and Enforcement of Foreign Judgments of the Secretary of State's Advisory Committee on Private International Law, May 9, 1979.

if the proceedings arose out of the business of such branch or establishment.³⁷⁵

Within the United States, eleven states³⁷⁶ have adopted the Uniform Foreign Money Judgments Recognition Act.³⁷⁷ This law requires enforcement of a foreign country's judgment when jurisdiction is predicated on the defendant's having a business office in that nation, but only if the claim arose "out of business done by the defendant through that office in the foreign country."³⁷⁸ Thus, the framers of treaties, as well as of our domestic legislation, have concluded that jurisdiction in the international sense, *i.e.*, jurisdiction that entitles a judgment to enforcement by other countries, should not be based merely on the defendant's doing business within the territory. Rather, some additional connecting factor must be present, such as a link between the cause of action and the business activity of the defendant within that territory. The *Finnish National Airlines* approach seems clearly rejected.

A comparable situation exists in reference to torts. Committing a tort within the territory is a basis for jurisdiction under most state long-arm statutes.³⁷⁹ When the act or omission to act occurs in one state and the injury in another, our courts in purely domestic fact situations have held that jurisdiction may lie in the state where only the injury has taken place, even though no other contact exists between the defendant and the forum, and the tortious act occurred elsewhere.³⁸⁰ The question arises whether this rule should be extended to international situations. In *Insurance Company of North America and Crystal Boat Co. v. Marina Salina Cruz*³⁸¹ the work on the ship was performed in Mexico while the sinking of that vessel allegedly took place within the territorial sea of Alaska. Thus, the act or omission to act occurred outside the United States, while the injury happened inside the United States. Similarly, the act or omission causing the blowout of the oil well in the Campeche Bay may have occurred in Mexico, while the damage to the ocean and beaches took place in Texas.

375. *Id.*

376. These states are: Alaska, ALASKA STAT. §§ 09.30.100-.180 (1972); California, CAL. CIV. PROC. CODE §§ 1713-1713.8 (West Supp. 1979); COLO. REV. STAT. § 13-62-101 to 13-62-109 (Supp. 1978); Illinois, ILL. REV. STAT. ch. 77, §§ 121-129 (1966); Maryland, MD. CRS. & JUD. PROC. CODE ANN. §§ 10-701 to -709 (1974); Massachusetts, MASS. GEN. LAWS ANN. ch. 235, § 23A (Michie/Law. Co-op 1974); Michigan, MICH. COMP. LAWS ANN. §§ 691.1151-.1159 (1968); New York, N.Y. CIV. PRAC. LAW §§ 5301-5309 (McKinney 1978); and Oklahoma, OKLA. STAT. tit. 12, §§ 710-718 (Supp. 1979-1980); OR. REV. STAT. § 24.200-24.255 (1977); WASH. REV. CODE § 6.40.010-6.40.915 (Supp. 1978).

377. UNIFORM FOREIGN MONEY JUDGMENTS RECOGNITION ACT. *See also* Carl, *Recognition of Texas Judgments in Courts of Foreign Nations—and Vice Versa*, 13 HOUS. L. REV. 680 (1976); Carl, *Proposed Legislation: Uniform Foreign Country Judgments Recognition Act*, 40 TEX. B.J. 40 (1977).

378. UNIFORM FOREIGN MONEY JUDGMENTS RECOGNITION ACT § 5(a)(5).

379. *See, e.g.*, TEX. REV. CIV. STAT. ANN. art. 2031(b), § 4 (Vernon Supp. 1980).

380. *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E.2d 761 (1961). *Cf. Eyerly Aircraft Co. v. Killian*, 414 F.2d 591 (5th Cir. 1969) (The Fifth Circuit recognized the single tort theory but concluded that it did not need to rely on the theory because the defendant in *Eyerly* had several contacts with the state).

381. No. 79-4050 (Alaska, filed Aug. 4, 1976).

Should the language "occurring in the United States" in section 1605(a)(5) and "direct effect in the United States" in section 1605(a)(2) of the FSIA be interpreted as authorizing jurisdiction in an American court when a tortious act or omission occurs outside the United States, but the injury takes place within the United States? The Hague Convention provides for international recognition of a judgment when jurisdiction is based on the place where injuries to person or property occurred "if the *author* of the injury or damage was *present* in the territory at the time when those facts occurred."³⁸² The September 1978 draft of the United States-United Kingdom judgments convention would compel recognition of the other country's tort judgments only if the place where the judgment was rendered was the location where both the act or omission *and* the injury occurred,³⁸³ in addition, the defendant or its agent must have been physically present in that state.³⁸⁴ The Uniform Foreign Money Judgments Recognition Act compels enforcement of such judgments from foreign countries only when jurisdiction is based on a claim arising out of the business activities of the defendant's office in the foreign nation or out of the operation by the defendant of a motor vehicle or plane within the foreign state.³⁸⁵

Drafters of those statutes and treaties found the foregoing types of restrictions on national jurisdiction a *sine qua non* to any possible achievement of orderly enforcement of judgments abroad.³⁸⁶ Similarly, American courts would be well advised in their structuring of due process guidelines under the FSIA to respect the perspectives of other nations as to what constitutes an acceptable basis for jurisdiction. Thus, even when jurisdiction would lie within a purely domestic context, prudence may dictate refusal to exercise jurisdiction over a foreign sovereign defendant if such a claim would be perceived as "excessive" in other legal systems. In this case, "[o]nly judicial restraint will be able to offer a semblance of an international administration of justice."³⁸⁷

For some time now, the United States has objected to what it views as exorbitant jurisdictional claims by other nations. For example, French law permits jurisdiction over a defendant anywhere in the world, if the *plaintiff* happens to be a French national.³⁸⁸ In various international arenas, the United States has been urging other countries to abandon their own exces-

382. *Supra* note 372, art. 10(4) (emphasis added).

383. Article 10(j)(ii), Convention Between the United Kingdom of Great Britain and Northern Ireland and the United States of America Providing for the Reciprocal Recognition and Enforcement of Judgments in Civil Matters, Text of September 1978.

384. *Id.* art. 10(j)(i); see Comment, *The Effect of the Proposed U.S.—U.K. Reciprocal Recognition and Enforcement of Civil Judgments Treaty on Current Recognition Practice in the United States*, 18 COLUM. J. TRANSNAT'L L. 119 (1979).

385. UNIFORM FOREIGN MONEY JUDGMENTS RECOGNITION ACT § 5(a)(5) & (6).

386. See notes 372-78 *supra* and accompanying text.

387. A. EHRENZWEIG & E. JAYME, *supra* note 362, at 37.

388. C. CIV. art. 14; see E.E.C., Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (as amend. 1978) arts. 3 & 4, reprinted in 18 INT'L LEGAL MAT'LS 21 (1979); Carl, *The Common Market Judgments Convention—Its Threat and Challenge to Americans*, 8 INT'L LAW. 446 (1976).

sive jurisdictional grounds. If United States courts now assume jurisdiction over foreign sovereign defendants on such a basis, we will enter the next round of international negotiations with hands that are less than clean.

Finally, practical difficulties can arise under the FSIA because the Department of State is unable to shield a foreign sovereign from suits even when significant political advantages might thereby be gained. A principal purpose of the FSIA is "to transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby reducing the foreign political implications of immunity decisions. . . ." ³⁸⁹ As a result, the Department of State may now submit an *amicus curiae* brief, but the ultimate decision rests with the judiciary, whose determination must be based upon legal criteria, not diplomatic considerations.

Assume American hostages are being held by a foreign government. While negotiating for their release, the United States Government wishes to offer as a *quid pro quo* the termination of pending litigation against that nation within this country. Under the FSIA, the executive would have no such authority; similarly, the judiciary probably cannot dismiss the actions if the jurisdictional criteria of the Act is satisfied.

The current dispute with Mexico over the blowout of the Ixtoc well could be more suitably resolved through diplomatic channels. If bilateral settlement efforts fail, the next best alternative would be resort to an impartial international forum, such as the World Court³⁹⁰ or an *ad hoc* claims commission. Such bodies generally use decision-makers from neutral countries. By contrast, under the FSIA Mexico now faces the prospect of a possibly adverse judgment for hundreds of millions of dollars rendered by a judge who is a citizen of both the nation and the state that claim to have been injured by the oil slick.

Although the United States and Mexico may prefer diplomatic channels for settlement, the FSIA apparently prevents the Department of State from interfering with the pending cases in Houston. Mindful of "our government's ongoing efforts to strengthen relations with our good neighbor, the Republic of Mexico,"³⁹¹ the Attorney General for the State of Texas, in filing a \$10 million suit against SEDCO and Permargo, refrained from suing Pemex, the Mexican government-owned company.³⁹² As to the other claimants, the United States executive branch seems powerless to halt or delay the proceedings and procedural technicalities may soon compel even the state of Texas to join Pemex as a defendant.³⁹³

The FSIA was intended to free the Department of State from undesir-

389. H.R. REP. NO. 94-1487, *supra* note 38, at 7, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS at 6606, 15 INT'L LEGAL MAT'LS at 1402.

390. Statute of the International Court of Justice, T.S. 993.

391. Letter from Mark White, Attorney General of Texas, to U.S. Secretary of State, Cyrus Vance (Oct. 11, 1979).

392. Wall St. J., Oct. 19, 1979, at 16, col. 2.

393. Letter from Mark White, Attorney General of Texas, to U.S. Secretary of State, Cyrus Vance (Oct. 11, 1979).

able political pressures concerning routine commercial transactions; in fact, the Act may turn out to be a straitjacket hindering the effective conduct of foreign affairs. This possibility raises the question of whether the FSIA constitutes an unconstitutional delegation of the executive's foreign affairs powers to the judicial branch. A thorough exploration of this issue is beyond the scope of the present article, but a few lines of thought may nevertheless be suggested for fuller treatment elsewhere.

Judicial abstention has been considered especially appropriate in the area of foreign affairs. Lower courts have, for instance, invoked the political question doctrine to justify abstention from deciding constitutional issues arising out of the Vietnam war; several of these cases used the doctrine to prevent the judiciary from inquiring whether the President had exceeded his constitutional authority in engaging in a war not declared by Congress.³⁹⁴ More recently, the ownership of lands disputed by foreign nations was ruled a "political question of foreign relations, the resolution of which is committed to the executive branch by the Constitution."³⁹⁵

The act of state doctrine also represents a concern by the judiciary that it not interfere with the foreign affairs power of the President. As the Supreme Court stated in *Banco Nacional de Cuba v. Sabbatino*:³⁹⁶

The act of state doctrine does, however, have "constitutional" underpinnings. It arises out of the basic relationships between branches of government in a system of separation of powers. It concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations. The doctrine as formulated in past decisions expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere. . . .³⁹⁷

In explaining why the judiciary should frequently defer to the executive in this field, Professor Henkin writes: "Judge-made law, the courts must recognize, can only serve foreign policy grossly and spasmodically; their attempts to draw lines and make exceptions must be bound in doctrine and justified in reasoned opinions, and they cannot provide flexibility, completeness, and comprehensive coherence."³⁹⁸

394. *Mora v. McNamara*, 387 F.2d 862, 862 (D.C. Cir.), *cert. denied*, 389 U.S. 934 (1967); *Luftig v. McNamara*, 373 F.2d 664, 665 (D.C. Cir.), *cert. denied*, 387 U.S. 945 (1967); *cf. DaCosta v. Laird*, 448 F.2d 1368 (2d Cir. 1971) (the propriety of participation by the Congress and the Executive, as well as the means by which they do it, is a political question outside the power and competency of the judiciary), *cert. denied*, 405 U.S. 979 (1972); *Orlando v. Laird*, 443 F.2d 1039 (2d Cir.) (the Second Circuit decided that some mutual participation between Congress and the President was necessary, but that if there was some mutual participation, the propriety of the means chosen by Congress to approve the actions of the President was a political question), *cert. denied*, 404 U.S. 869 (1971).

395. *Occidental of Umm Al Qaywayn, Inc. v. A Certain Cargo of Petroleum Laden Aboard the Tanker Dauntless Colocotronis*, 577 F.2d 1196 (5th Cir. 1978), *reprinted in* 17 INT'L LEGAL MAT'LS 1190 (1978).

396. 376 U.S. 398 (1964).

397. *Id.* at 423.

398. L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 220 (1972).

On November 30, 1979 the Court of Appeals for the District of Columbia ruled that no approval of the Senate or the Congress was necessary for the President to terminate the mutual defense treaty with Taiwan.³⁹⁹ The appellate court stated the President must have the power "to conduct our foreign policy in a rational and effective manner" and added, "The subtleties involved in maintaining amorphous relationships are often the very stuff of diplomacy—a field in which the President . . . has responsibility under the Constitution."⁴⁰⁰ The FSIA, by precluding the possibility of intervention in suits against foreign sovereigns, can also limit the executive's ability to conduct foreign affairs "in a rational and effective manner."

VI. CONCLUSIONS

The FSIA makes some important contributions toward the establishment of an orderly procedure for resolving commercial disputes between United States citizens and foreign sovereigns. The long-arm provisions help clarify a situation where uncertainty previously reigned. Abolition of in rem and quasi in rem jurisdiction remove a major source of irritation to foreign governments. Although compliance may not always be easy, the service provisions of the FSIA provide litigants with precise instructions on how to proceed against a foreign sovereign. Likewise, it is helpful to have venue requirements spelled out in the Act. Successful litigants may now execute their judgments against certain kinds of commercial property of the foreign government. Where this remedy is available, the plaintiff is relieved of the onerous burden involved in trying to satisfy his judgment either through diplomatic intervention with the foreign government by the United States Department of State or through enforcement of his American judgment by a court in the other country.

Nevertheless, the FSIA is not without problems. Although the Act would appear to shield foreign sovereigns from pre-judgment attachment, this new protection may be severely eroded if courts too eagerly resort to injunctions or attachments for security purposes prior to entry of final judgment. In addition, the American judiciary would be well advised to avoid parochialism in applying jurisdictional standards under the long-arm provisions of the FSIA. Certain minimal contacts may be appropriate for due process purposes when applied to an American defendant headquartered in a sister state; when used to secure jurisdiction over a foreign

399. See Comment, *Treaty Termination by the President Without Senate or Congressional Approval: The Case of the Taiwan Treaty*, 33 Sw. L.J. 729 (1979).

400. Dallas Times Herald, Dec. 1, 1979, at 1, col. 2. On Dec. 13, 1979, the Supreme Court dismissed the appeal. The reasons for the decision varied. Chief Justice Burger and Justices Stewart, Stevens, and Rehnquist considered the question a political one. Justice Powell argued that there was no "controversy" since Congress had not forced a confrontation by passing a resolution to block the Executive. Justice Marshall gave no reason for his vote to dismiss. Justice Brennan stated that the President's authority is "well-established"; Justice Brennan would have granted review of the case and then automatically upheld the appeals court. Wermiel, *Justices Order Taiwan Treaty Suit Dismissed*, Wall St. J., Dec. 14, 1979, at 4, col. 1. See also Henkin, *Litigating the President's Power to Terminate Treaties*, 73 Am. J. INT'L L. 647 (1979).

government on the other side of the globe, those same contacts should perhaps be treated as insufficient to satisfy "traditional notions of fair play and natural justice." In determining what is "fair play" or "justice" in this transnational context, United States judges should consider not only American notions of proper jurisdictional grounds, but also those of other nations. There are a number of jurisdictional bases common to most countries in the world community. Grounds lacking such consensus should be avoided whenever a domestic court assumes power to decide a dispute involving an alien defendant, especially a foreign sovereign. Such controversies might be dismissed on the theory that, under the due process requirements of the *International Shoe* case, jurisdiction does not lie. Alternatively, refusal to hear certain disputes could be predicated on the doctrine of *forum non conveniens*,⁴⁰¹ i.e., even though jurisdiction may technically exist, the United States is not a convenient place for the litigation. Although some older opinions displayed a judicial reluctance to decline jurisdiction when the claimant would thereby be forced to sue in a foreign nation,⁴⁰² modern American courts are dismissing cases on the ground of *forum non conveniens* even when the plaintiff's only alternative is suit in another country.⁴⁰³ As Chief Justice Burger, in referring a controversy over to the court of a foreign country, wrote in 1972:

The expansion of American business and industry will hardly be encouraged if . . . we insist on a parochial concept that all disputes must be resolved under our laws and in our courts. . . . We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our

401. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947), established the basic policy factors to be analyzed in applying this doctrine:

Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; . . . and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforceability of the judgment if one is obtained. . . . There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the . . . law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself.

Id. at 508-09.

402. *Regie Nationale Des Usines Renault v. Superior Court*, 208 Cal. App. 2d 702, 25 Cal. Rep. 530 (1962); *Burt v. Isthmus Dev. Co.*, 218 F.2d 353 (5th Cir. 1955); *Gkiasis v. Steamship Yiosonas*, 387 F.2d 460 (4th Cir. 1967).

403. *Fitzgerald v. Texaco, Inc.*, 521 F.2d 448 (2d Cir. 1975), *cert. denied*, 423 U.S. 1052 (1976) (dismissed even though the defendant was an American); *Anastasiadis v. S.S. Little John*, 346 F.2d 281 (5th Cir. 1965); *Vanity Fair Mills, Inc. v. T. Eaton Co.*, 234 F.2d 633 (2d Cir. 1956), *cert. denied*, 352 U.S. 871 (1956); *Poseidon Schiffahrt Gm. B.H. v. M/S Netuno*, 335 F. Supp. 684 (S.D. Ga. 1972); *Poulos v. Mene Grande Oil Co.*, 123 F. Supp. 577 (S.D.N.Y. 1954); *Galban Lobo Trading Co. S/A v. Diponegoro*, 108 F. Supp. 741 (S.D.N.Y. 1952). The judge in *Vanity Fair Mills, Inc.* stated, "An American citizen does not have an absolute right under all circumstances to sue in an American court." 234 F.2d at 645. In *Mohr v. Allen*, 407 F. Supp. 483 (S.D.N.Y. 1976) the plaintiff sought an accounting in a federal court in New York for alleged joint ventures which took place largely in Mexico. The judge dismissed on the ground of *forum non conveniens* because "[t]here can be little doubt that this dispute, with its clear Mexican locus, complexities and contacts, should be resolved in Mexico in the interest of fairness and justice." *Id.* at 488.

courts.⁴⁰⁴

The most troublesome aspect of the FSIA is the elimination of the executive branch in this decision-making process. In the *Aquino Robles* case, the Mexican government was hailed before an American court in a situation where jurisdiction was clearly lacking.⁴⁰⁵ Yet the Department of State concluded that it could not intervene under the FSIA. Without such assistance from the executive branch, foreign sovereigns can be forced to retain costly defense counsel even in cases in which the Act does not confer jurisdiction on American courts. To minimize this financial burden, foreign sovereigns should be permitted to appear pro se in preliminary hearings on the issues of jurisdiction.

Lastly, adjudication before a United States tribunal may not be the best method of settling certain international controversies; diplomatic negotiations may offer a far preferable approach. By shutting off this latter channel for dispute resolution, the FSIA has limited the President's authority over foreign affairs. Hence, the constitutionality of the Act becomes open to question. The need for a variety of techniques with which to respond to a complex, interdependent global community mandates a revesting in the Executive Branch of at least a modicum of control over litigation involving foreign sovereigns. Accordingly, the FSIA should be amended to allow sovereign immunity as a defense, even in commercial matters, if the President has determined that immunity is required in the particular case by the foreign policy interests of the United States and if a suggestion to this effect has been filed on his behalf in that case with the court.⁴⁰⁶ Such executive assertion of immunity could go to either the issue of jurisdiction or of execution.

At first impression, this proposal may sound like a call for a return to pre-FSIA status; there would, however, be significant differences. The key improvements made by that Act would continue to exist; for instance, the rules on venue, service and personal jurisdiction. Moreover, section 1605 enumerates the acts that will subject a foreign sovereign to jurisdiction, and sections 1610 and 1611 describe the type of property against which execution may be had. Once the requirements of sections 1605 or 1610 and 1611 have been satisfied, there should arise a rebuttable presumption that interposition of a sovereign immunity defense is not appropriate. Only by a strong showing that United States foreign policy interests so require should this presumption be overcome and only then should the Executive intervene. Following this approach would preserve the advantages of the existing FSIA while ensuring that the President has sufficient flexibility to manage foreign affairs properly.

404. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972).

405. See text accompanying notes 345-52 *supra*.

406. See e.g., the Hickenlooper Amendment to the Foreign Assistance Act of 1962, 22 U.S.C. § 2370(e)(2) (1976), which prohibits courts from applying the act of state doctrine to certain classes of cases unless the "President determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States and a suggestion to this effect if filed on his behalf in that case with the court."

Appendix A

[From 15 *International Legal Materials* 1388 (1976)]

UNITED STATES: FOREIGN SOVEREIGN IMMUNITIES ACT OF
1976

[October 21, 1976]

Public Law 94-583

94th Congress

An Act

To define the jurisdiction of United States courts in suits against foreign states, the circumstances in which foreign states are immune from suit and in which execution may not be levied on their property, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Foreign Sovereign Immunities Act of 1976".

SEC. 2. (a) That chapter 85 of title 28, United States Code, is amended by inserting immediately before section 1331 the following new section:

“§ 1330. Actions against foreign states

“(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

“(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

“(c) For purposes of subsection (b), an appearance by a foreign state does not confer personal jurisdiction with respect to any claim for relief not arising out of any transaction or occurrence enumerated in sections 1605-1607 of this title.”.

(b) By inserting in the chapter analysis of that chapter before—
“1331. Federal question; amount in controversy; costs.”
the following new item:

“1330. Action against foreign states.”.

SEC. 3. That section 1332 of title 28, United States Code, is amended by striking subsections (a)(2) and (3) and substituting in their place the following:

“(2) citizens of a State and citizens or subjects of a foreign state;

“(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

“(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.”.

SEC. 4. (a) That title 28, United States Code, is amended by inserting after chapter 95 the following new chapter:

“Chapter 97.—JURISDICTIONAL IMMUNITIES OF FOREIGN STATES

“Sec.

“1602. Findings and declaration of purpose.

“1603. Definitions.

“1604. Immunity of a foreign state from jurisdiction.

“1605. General exceptions to the jurisdictional immunity of a foreign state.

“1606. Extent of liability.

“1607. Counterclaims.

“1608. Service; time to answer default.

“1609. Immunity from attachment and execution of property of a foreign state.

“1610. Exceptions to the immunity from attachment or execution.

“1611. Certain types of property immune from execution.

“§ 1602. Findings and declaration of purpose

“The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

“§ 1603. Definitions

“For purposes of this chapter—

“(a) A ‘foreign state’, except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

“(b) An ‘agency or instrumentality of a foreign state’ means any entity—

“(1) which is a separate legal person, corporate or otherwise, and

“(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

“(3) which is neither a citizen of a State of the United States as defined in section 1332 (c) and (d) of this title, nor created under the laws of any third country.

“(c) The ‘United States’ includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

“(d) A ‘commercial activity’ means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

“(e) A ‘commercial activity carried on in the United States by a for-

eign state' means commercial activity carried on by such state and having substantial contact with the United States.

"§ 1604. Immunity of a foreign state from jurisdiction

"Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

"§ 1605. General exceptions to the jurisdictional immunity of a foreign state

"(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

"(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

"(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

"(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

"(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue; or

"(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—

"(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

"(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

"(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state: *Provided*, That—

"(1) notice of the suit is given by delivery of a copy of the summons

and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; but such notice shall not be deemed to have been delivered, nor may it thereafter be delivered, if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit—unless the party was unaware that the vessel or cargo of a foreign state was involved, in which event the service of process of arrest shall be deemed to constitute valid delivery of such notice; and

“(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in subsection (b)(1) of this section or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state’s interest.

Whenever notice is delivered under subsection (b)(1) of this section, the maritime lien shall thereafter be deemed to be an in personam claim against the foreign state which at that time owns the vessel or cargo involved: *Provided*, That a court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose, such value to be determined as of the time notice is served under subsection (b)(1) of this section.

“§ 1606. Extent of liability

“As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

“§ 1607. Counterclaims

“In any action brought by a foreign state, or in which a foreign state intervenes, in a court of the United States or of a State, the foreign state shall not be accorded immunity with respect to any counterclaim—

“(a) for which a foreign state would not be entitled to immunity under section 1605 of this chapter had such claim been brought in a separate action against the foreign state; or

“(b) arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state; or

“(c) to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state.

“§ 1608. Service; time to answer; default

“(a) Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:

“(1) by delivery of a copy of the summons and complaint in accord-

ance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or

“(2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or

“(3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or

“(4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services—and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

As used in this subsection, a ‘notice of suit’ shall mean a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation.

“(b) Service in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign state:

“(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or

“(2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable international convention on service of judicial documents; or

“(3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state—

“(A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request or

“(B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or

“(C) as directed by order of the court consistent with the law of the place where service is to be made.

“(c) Service shall be deemed to have been made—

“(1) in the case of service under subsection (a)(4), as of the date of transmittal indicated in the certified copy of the diplomatic note; and

“(2) in any other case under this section, as of the date of receipt

indicated in the certification, signed and returned postal receipt, or other proof of service applicable to the method of service employed.

“(d) In any action brought in a court of the United States or of a State, a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state shall serve an answer or other responsive pleading to the complaint within sixty days after service has been made under this section.

“(e) No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. A copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.

“§ 1609. Immunity from attachment and execution of property of a foreign state

“Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter.

“§ 1610. Exceptions to the immunity from attachment or execution

“(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—

“(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or

“(2) the property is or was used for the commercial activity upon which the claim is based, or

“(3) the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law, or

“(4) the execution relates to a judgment establishing rights in property—

“(A) which is acquired by succession or gift, or

“(B) which is immovable and situated in the United States: *Provided*, That such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission, or

“(5) the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of automobile or other liability or casualty insurance covering the claim which merged into the judgment.

“(b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of

execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—

“(1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver, or

“(2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a) (2), (3), or (5), or 1605(b) of this chapter, regardless of whether the property is or was used for the activity upon which the claim is based.

“(c) No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter.

“(d) The property of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section, if—

“(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, and

“(2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state, and not to obtain jurisdiction.

“§ 1611. Certain types of property immune from execution

“(a) Notwithstanding the provisions of section 1610 of this chapter, the property of those organizations designated by the President as being entitled to enjoy the privileges, exemptions, and immunities provided by the International Organizations Immunities Act shall not be subject to attachment or any other judicial process impeding the disbursement of funds to, or on the order of, a foreign state as the result of an action brought in the courts of the United States or of the States.

“(b) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution, if—

“(1) the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution, notwithstanding any withdrawal of the waiver which the bank, authority or government may purport to effect except in accordance with the terms of the waiver; or

“(2) the property is, or is intended to be, used in connection with a military activity and

“(A) is of a military character, or

“(B) is under the control of a military authority or defense agency.”

(b) That the analysis of “PART IV.—JURISDICTION AND VENUE” of title 28, United States Code, is amended by inserting after—

“95. Customs Court.”,
the following new item:

“97. Jurisdictional Immunities of Foreign States.”.

SEC. 5. That section 1391 of title 28, United States Code, is amended by adding at the end thereof the following new subsection:

“(f) A civil action against a foreign state as defined in section 1603(a) of this title may be brought—

“(1) in any judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated;

“(2) in any judicial district in which the vessel or cargo of a foreign state is situated, if the claim is asserted under section 1605(b) of this title;

“(3) in any judicial district in which the agency or instrumentality is licensed to do business or is doing business, if the action is brought against an agency or instrumentality of a foreign state as defined in section 1603(b) of this title; or

“(4) in the United States District Court for the District of Columbia if the action is brought against a foreign state or political subdivision thereof.”.

SEC. 6. That section 1441 of title 28, United States Code, is amended by adding at the end thereof the following new subsection:

“(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.”.

SEC. 7. If any provision of this Act or the application thereof to any foreign state is held invalid, the invalidity does not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

SEC. 8. This Act shall take effect ninety days after the date of its enactment.

Approved October 21, 1976.

Appendix B

[From 16 *International Legal Materials* 159 (1977)]UNITED STATES: DEPARTMENT OF STATE REGULATIONS
UNDER THE FOREIGN SOVEREIGN IMMUNITIES ACT ON
NOTICE OF SUIT*

[Effective January 19, 1977]

Title 22—Foreign Relations

CHAPTER I—DEPARTMENT OF
STATESUBCHAPTER J—LEGAL AND RELATED
SERVICES

[Departmental Reg. 108.732]

PART 93—SERVICE ON FOREIGN
STATERegulations Under the Foreign Sovereign
Immunities Act of 1976

On December 14, 1976, a notice of proposed rulemaking was published in the *FEDERAL REGISTER* (41 FR 54495) to amend Title 22 of the Code of Federal Regulations by adding a new Part 93 to Subchapter J and by changing the title of Subchapter J. As was stated in that notice, the Secretary of State is to promulgate, pursuant to section 1608(a) of the Foreign Sovereign Immunities Act of 1976 (Pub. L. 94-583, 90 Stat. 2891), regulations prescribing the form of a "Notice of Suit" which is, in certain circumstances, to accompany the service of a summons and complaint upon a foreign state or its political subdivisions. Under section (a)(4) of the Act, the Secretary of State is also to take steps to transmit certain papers through diplomatic channels in prescribed circumstances.

Interested persons were invited to submit written comments regarding the proposed regulations not later than January 13, 1977. Based on consideration of the written comments submitted, the regulations for Part 93, Subchapter J, Chapter I of Title 22, Code of Federal Regulations are hereby adopted as set forth below.

Effective date: These regulations are effective January 19, 1977.

Dated: January 19, 1977.

MONROE LEIGH,
Legal Adviser,
Department of State.

Title 22 of the Code of Federal Regulations is amended by adding a new Part 93 to Subchapter J and by changing the title of Subchapter J to read as follows:

SUBCHAPTER J—LEGAL AND RE-
LATED SERVICESPART 93—SERVICE ON FOREIGN
STATE

SEC.

93.1 Service through the diplomatic channel.

93.2 Notice of Suit (or of default judgment).

AUTHORITY: Sec. 1608(a), Foreign Sovereign Immunities Act of 1976, Pub. L. 94-583 (28 U.S.C. 1608(a)); sec. 4, 63 Stat. 111, as amended (22 U.S.C. 2658).

§ 93.1 Service through the diplomatic channel.

(a) The Director of the Office of Special Consular Services in the Bureau of Security and Consular Affairs, Department of State ("The Director of Special Consular Services"), shall perform the duties of the Secretary of State under section 1608(a)(4) of Title 28, United States Code.

(b) When the clerk of the court concerned sends documents under section 1608(a)(4), of Title 28, United States Code, the Director of Special Consular Services shall promptly ascertain if the documents include the required copies of the notice of suit and of the summons and complaint (or default judgment), and any required translations. If not, he shall promptly advise the clerk of the missing items.

(c) Upon receiving the required copies of documents and any required translations, the Director of Special Consular Services shall promptly cause one copy of each such document and translation ("the documents") to be delivered—

(1) To the Embassy of the United States in the foreign state concerned, and the Embassy shall promptly deliver them to the foreign ministry or other appropriate authority of the foreign state, or

(2) If the foreign state so requests or if otherwise appropriate, to the embassy of the foreign state in the District of Columbia, or

(3) If (1) and (2) are unavailable, through an existing diplomatic channel,

* [Reproduced from the U.S. *Federal Register*, Vol. 42, No. 22 (February 2, 1977), 6366-67.]

such as to the embassy of another country authorized to represent the interests of the foreign state concerned in the United States.

(d) The documents, when delivered under paragraph (c) of this section, shall be accompanied by a diplomatic note of transmittal, requesting that the documents be forwarded to the appropriate authority of the foreign state or political subdivision upon which service is being made. The note shall state that, under United States law, questions of jurisdiction and of state immunity must be addressed to the court and not to the Department of State, and that it is advisable to consult with an attorney in the United States.

(e) If the documents are delivered under paragraph (c)(1) of this section, the Embassy of the United States shall promptly transmit by diplomatic pouch, to the Director of Special Consular Services, a certified copy of the diplomatic note of transmittal. If the documents are delivered under paragraph (c) (2) or (3) of this section, the Director of Special Consular Services shall prepare a certified copy of the diplomatic note of transmittal. In each case, the certification shall state the date and place the documents were delivered. The Director of Special Consular Services shall then promptly send the certified copy to the clerk of the court concerned.

§ 93.2 Notice of suit (or of default judgment).

(a) A Notice of Suit prescribed in section 1608(a) of Title 28, United States Code, shall be prepared in the form that appears in the Annex to this section.

(b) In preparing a Notice of Suit, a party shall in every instance supply the information specified in items 1 through 5 of the form appearing in the Annex to this section. A party shall also supply information specified in item 6, if notice of a default judgment is being served.

(c) In supplying the information specified in item 5, a party shall in simplified language summarize the nature and purpose of the proceeding (including principal allegations and claimed bases of liability), the reasons why the foreign state or political

subdivision has been named as a party in the proceeding, and the nature and amount of relief sought. The purpose of item 5 is to enable foreign officials unfamiliar with American legal documents to ascertain the above information.

(d) A party may attach additional pages to the Notice of Suit to complete information under any item.

(e) A party shall attach, as part of the Notice of Suit, a copy of the Foreign State Immunities Act of 1976 (Pub. L. 94-583; 90 Stat. 2891).

ANNEX

NOTICE OF SUIT

(OR OF DEFAULT JUDGMENT¹)

1. Title of legal proceeding; full name of court; case or docket number.
2. Name of foreign state (or political subdivision) concerned:
3. Identity of the other Parties:

JUDICIAL DOCUMENTS

4. Nature of documents served (e.g., Summons and Complaint; Default Judgment):

5. Nature and purpose of the proceedings; why the foreign state (or political subdivision) has been named; relief requested:

6. Date of default judgment (if any):

7. A response to a "Summons" and "Complaint" is required to be submitted to the court, not later than 60 days after these documents are received. The response may present jurisdictional defenses (including defenses relating to state immunity):

8. The failure to submit a timely response with the court can result in a Default Judgment and a request for execution to satisfy the judgment. If a default judgment has been entered, a procedure may be available to vacate or open that judgment.

9. Questions relating to state immunities and to the jurisdiction of United States courts over foreign states are governed by the Foreign Sovereign Immunities Act of 1976, which appears in sections 1330, 1391(f), 1441(d), and 1602 through 1611, of Title 28, United States Code (Pub. L. 94-583; 90 Stat. 2891).

[FR Doc. 77-3180 Filed 2-1-77; 8:45 am]

SOUTHWESTERN LAW JOURNAL

VOLUME 33

NOVEMBER 1979

NUMBER 4

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